TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 35

UNITED STATES OF AMERICA, PETITIONER,

vs.

ABRAHAM MINKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1955

CERTIORARI GRANTED APRIL 11, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 35

UNITED STATES OF AMERICA, PETITIONER,

vs.

ABRAHAM MINKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. M-1609

THE UNITED STATES OF AMERICA

v.

ABRAHAM MINKER

[File endorsement omitted]

MOTION FOR ORDER TO REQUIRE WITNESS ABRAHAM MINKER TO APPEAR AND TESTIFY—Filed January 14, 1954

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania:

The petition of W. Wilson White, Esquire, United States Attorney for the Eastern District of Pennsylvania, by G. Clinton Fogwell, Jr., Esquire, Assistant United States Attorney, and William B. Taffet, Esquire, District Counsel, Immigration and Naturalization Service, United States Department of Justice, Philadelphia,
2 Pennsylvania, for the United States of America, respectfully represents that:

1. Karl I. Zimmerman is and has been at all times since prior to September 8, 1953 an immigration officer, being the duly appointed District Director of Immigration and Naturalization, in charge of the Philadelphia District of the Immigration and Naturalization Service, United States Department of Justice.

2. The respondent, Abraham Minker, is and at all times since prior to September 8, 1953 has been a naturalized citizen of the United States.

3. On September 8, 1953 the aforesaid Karl I. Zimmerman did, pursuant to the authority vested in him by Section 235(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1225(a)), issue a subpoena directed to the respondent, requiring the appearance of the respondent at Room 711, Lafayette Building, 5th and Chestnut Streets, Philadelphia, Pennsylvania, at 1:00 P.M. on September 16, 1953, to give testimony in the case of Abraham Minker. A copy of the said subpoena is attached hereto as Exhibit A.

4. The said subpoena was personnally served upon the respondent on September 10, 1953.

5. On September 14, 1953 respondent, by counsel, filed a motion with this Court to quash and set aside the aforesaid subpoena.

6. The said motion was presented to this Court on September 15, 1953, at which time an oral order was entered staying further action with reference to the subpoena pending decision by this Court on the motion to quash.

3 7. Hearing on the motion was heard by this Court on October 28, 1953.

8. By opinion and order dated November 25, 1953 this Court in the case of "In the Matter of Abraham Minker", No. M-1588, denied the aforesaid motion to quash and set aside the subpoena.

9. On December 2, 1953 the aforesaid Karl I. Zimmerman did, by registered mail, formally notify and command the respondent, Abraham Minker, to appear on January 5, 1954, at 10:00 A.M., in Room 711 Lafayette Building, 5th and Chestnut Streets, Philadelphia, Pennsylvania, in accordance with the provisions of the original subpoena served upon him. A copy of the said notice is attached hereto as Exhibit B.

10. The said notice was delivered by the United States postal authorities to the respondent, Abraham Minker, on December 4, 1953, and there was obtained from the said respondent at that time his written receipt for the said notification. A photostatic copy of the said receipt is attached hereto as Exhibit C.

11. The respondent, Abraham Minker, failed to appear on January 5, 1954, as notified and commanded.

WHEREFORE, your petitioner prays that this Honorable Court enter an order requiring the said respondent, Abraham Minker, to appear before Karl I. Zimmerman, District Director of Immigration and Naturalization, or such duly authorized representative as the said Karl I. Zimmerman may appoint or delegate, at Room 711 Lafayette Building, 5th and Chestnut Streets, Philadelphia, Pennsylvania, at such time as the said Karl I. Zimmerman

4 may designate, upon not less than 10 days written notice to the respondent, and to testify in the administrative proceedings captioned "In re Abraham Minker", pending before the Immigration and Naturalization Service, United States Department of Justice.

Respectfully submitted,

W. WILSON WHITE,
United States Attorney,

By: (S.) G. CLINTON FOGWELL, JR.,
Assistant United States Attorney.

WILLIAM B. TAFFET,
District Counsel,
Immigration and Naturalization Service,
Philadelphia, Pennsylvania.

Dated: January 14, 1953.

EXHIBIT "A" TO MOTION

United States of America

Department of Justice

Immigration and Naturalization Service
Philadelphia 6, Pennsylvania

Office of Origin: Philadelphia, Pa.

Subpena

2770-P-184007
Date September 8, 1953

In re Abraham Minker
To: Abraham Minker

5 Pursuant to the provisions of Section of the Immigration and Nationality Act, you are hereby commanded to attend and give testimony as set forth below, viz:

Place of appearance: Room 711, Lafayette Building, 5th & Chestnut Streets, Philadelphia 6, Pennsylvania.

Time you are required to appear: 1:00 P.M.

Date you are required to appear: Wednesday, September 16, 1953.

You are also commanded to produce and bring with you the following books, papers, and documents, viz:

(S.) KARL I. ZIMMERMAN.
(Name)

.....
(Title)

(Seal)

Return on Service of Subpena

I hereby certify that on the ..... day of ....., 19...., I served the above subpena on the witness named above by

(Name)

.....
(Title)

6 EXHIBIT "B" TO MOTION

United States Department of Justice

Immigration and Naturalization Service, Lafayette Building, 5th & Chestnut Sts., Philadelphia 6, Pa.

2770-P-18[illegible]07 ID

December 2, 1953

Registered Mail
Return receipt requested—Addressee Only
Mr. Abraham Minker
1954 Alsace Road
Reading, Pennsylvania

Dear Mr. Minker:

Reference is had to subpoena issued by me on September 8, 1953 and heretofore served upon you on September 10, 1953, requiring your appearance before an Officer of this Service on September 16, 1953.

By direction of District Judge George A. Welsh, United States District Court, Philadelphia, Pennsylvania, issued on September 15, 1953, no action was taken with reference to that subpoena pending disposition by the Court of a motion to quash the subpoena filed by your counsel.

The Court has now by its order of November 25, 1953 denied the motion to quash and set aside the subpoena and, accordingly, you are herewith formally notified and commanded to appear, in accordance with the provisions of the original subpoena served upon you, on January 5, 1954 at 10 A.M., in Room 711, Lafayette Building, 5th and Chestnut Streets, Philadelphia 6, Pennsylvania.

7 You are advised that your attendance is commanded in accordance with the above referred to subpoena in order that you may give testimony in connection with and relating to the possible institution of proceedings seeking the revocation of your naturalization in accordance with Section 340 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1451).

Very truly yours,

KARL I. ZIMMERMAN,
District Director.

Registered Mail
CC: Jacob Kossman, Esq.
1325 Spruce Street
Philadelphia, Pennsylvania
Return receipt requested

EXHIBIT "C"

Note: Exhibit "C" (registered letter return receipt) has been omitted.

8 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

ORDER DIRECTING ABRAHAM MINKER TO APPEAR, ETC.—March 29, 1954

This matter coming on before this Court, before Welsh, J., upon motion of W. Wilson White, Esquire, United States Attorney, by G. Clinton Fogwell, Jr., Esquire, Assistant United States Attorney, and William B. Taffet, Esquire, District Counsel, Immigration and Naturalization Service, United States Department of Justice, Philadelphia, Pennsylvania, for the United States of America, and it appearing that the question of the legality of the issuance of the administrative subpoena involved herein was decided by this Court's opinion and order of November 25, 1953 in the Matter of Abraham Minker, No. M-1588, and it further appearing that the respondent was notified to appear before the District Director of Immigration and Naturalization at Philadelphia, Pennsylvania, and testify on January 5, 1954, and it further appearing that he has failed to so appear and testify,

It is, on this 29th day of March, 1954, ORDERED, DIRECTED AND DECREED that the respondent, Abraham Minker, appear before Karl I. Zimmerman, District Director of Immigration and Naturalization, or his duly authorized and delegated representative, at Room
9 711 Lafayette Building, 5th and Chestnut Streets, Philadelphia, Pennsylvania, at such time as the said Karl I. Zimmerman shall, upon not less than 10 days written notice, require, and testify in the administrative proceedings captioned "In re Abraham Minker", pending before the Immigration and Naturalization Service, United States Department of Justice.

(S.) GEO. A. WELSH, *J.*

10 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

MOTION FOR ORDER ADJUDGING WITNESS ABRAHAM MINKER IN CONTEMPT—Filed May 27, 1954

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania:

The petition of W. Wilson White, Esquire, United States Attorney for the Eastern District of Pennsylvania, by G. Clinton
11 Fogwell, Jr., Esquire, Assistant United States Attorney, and William B. Taffet, Esquire, District Counsel, Immigration and Naturalization Service, United States Department of Justice, Philadelphia, Pennsylvania, for the United States of America, respectfully represents that:

1. Karl I. Zimmerman is and has been at all times since prior to September 8, 1953 an immigration officer, being the duly appointed District Director of Immigration and Naturalization, in charge of the Philadelphia District of the Immigration and Naturalization Service, United States Department of Justice.

2. The respondent, Abraham Minker, is and at all times since prior to September 8, 1953 has been a naturalized citizen of the United States.

3. On September 8, 1953 the aforesaid Karl I. Zimmerman did, pursuant to the authority vested in him by Section 235(a) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1225(a)), issue a subpoena directed to the respondent, requiring the appearance of the respondent at Room 711, Lafayette Building, 5th and Chestnut Streets, Philadelphia, Pennsylvania, at 1:00 P. M. on September 16, 1953, to give testimony in the case of Abraham Minker.

4. The said subpoena was personally served upon the respondent on September 10, 1953.

5. On September 14, 1953 respondent, by counsel filed a motion with this Court to quash and set aside the aforesaid subpoena.

6. By opinion and order dated November 25, 1953 this Court in the case of "In the Matter of Abraham Minker", No. M-1588,
12 denied the aforesaid motion to quash and set aside the subpoena.

7. A further notice was then served upon respondent Abraham Minker on December 4, 1953, requiring his appearance before Karl

I. Zimmerman, in accordance with the provisions of the original subpoena, on January 5, 1954.

8. The respondent, Abraham Minker, failed to appear on January 5, 1954, as notified and commanded.

9. By order dated March 29, 1954 this Court granted the motion of petitioner herein and directed that respondent Abraham Minker appear before petitioner Karl I. Zimmerman or his duly authorized and delegated representative, upon not less than ten days written notice, and testify in the administrative proceedings captioned "In re Abraham Minker" pending before the Immigration and Naturalization Service, United States Department of Justice.

10. Due and proper notice requiring Abraham Minker to appear in accordance with this Court's order of March 29, 1954 was given to the respondent, requiring his appearance on May 13, 1954 at 10:00 A.M. at the office of the Immigration and Naturalization Service, Room 711 Lafayette Building, 5th and Chestnut Streets, Philadelphia, Pennsylvania, and the said respondent did fail to appear; all of which appears in more particularity in the affidavit of Elmer E. Wilson, annexed hereto and made a part hereof.

WHEREFORE, your petitioner prays that this Honorable Court enter an order requiring the said respondent, Abraham Minker, to appear before this Court at a time and date to be fixed and show cause, if any there be, as to why he should not be
13 adjudged in contempt of this Court's order of March 29, 1954.

Respectfully submitted,

W. WILSON WHITE,
United States Attorney,
By: (S.) G. CLINTON FOGWELL, JR.,
Assistant United States Attorney,
WILLIAM B. TAFFET,
District Counsel,
Immigration and Naturalization Service,
Philadelphia, Pennsylvania.

Dated: May 27, 1954.

AFFIDAVIT OF ELMER E. WILSON

STATE OF PENNSYLVANIA,
County of Philadelphia, ss.

I. Elmer E. Wilson, being duly sworn according to law, depose and say that:

1. My name is Elmer E. Wilson.

2. I am a duly appointed and empowered immigration officer of the Immigration and Naturalization Service, United States Department of Justice.

3. I have been officially assigned to the Philadelphia District of the said Immigration and Naturalization Service since January 20, 1954.

14 4. As part of my official duties I was directed to investigate the case of Abraham Minker of Reading, Pennsylvania, with particular respect to the question of whether the said Abraham Minker's naturalization had or had not been illegally and improperly obtained.

5. During the course of my official investigation of the said Abraham Minker I have met him, know his physical appearance and believe I would immediately recognize him if I saw him again.

6. In connection with my official duties and pursuant to an order entered in the United States District Court for the Eastern District of Pennsylvania in the case of United States of America vs. Abraham Minker, No. M-1609, dated March 29, 1954, I did, on April 21, 1954, cause to be written and deposited in the United States mails a letter addressed to Abraham Minker, 1954 Alsace Road, Reading, Pennsylvania, requesting the said Abraham Minker to appear at the office of the Immigration and Naturalization Service, Room 711, Lafayette Building, Fifth and Chestnut Street, Philadelphia, Pennsylvania, at 10:00 a. m. on May 13, 1954.

7. The said letter was sent by registered mail, return receipt requested, deliver to addressee only.

8. I did thereafter receive a return receipt from the post office department indicating that personal delivery of the aforementioned letter had been made to Abraham Minker on April 23, 1954.

9. I was present at the office of the Immigration and Naturalization Service, Room 711, Lafayette Building, Fifth and Chestnut Streets, Philadelphia, Pennsylvania, continuously from 8:30 a. m. to 12:30 p. m. and from 1:00 p. m. to 5:00 p. m. on May 13, 1954.

15-16 10. The said Abraham Minker did not appear at the office of the Immigration and Naturalization Service, Room 711, Lafayette Building, Fifth and Chestnut Streets, Philadelphia, Pennsylvania, on May 13, 1954 as requested.

(S.) ELMER E. WILSON.

Subscribed and sworn to before me this 26th day of May, 1954.

(S.) CHARLES HALPERN,
Notary Public.

My Commission Expires Feb. 10, 1955.
(Seal.)

[File endorsement omitted]

N THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

RDER TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE ADJUDGED IN CONTEMPT—May 27, 1954

And now, to wit, this 27th day of May, 1954, upon consideration f the within petition for a rule to show cause, it is

ORDERED and DECREED that the respondent, Abraham Minker, how cause, if any there be, why he should not be adjudged in ontempt of this Court's order of March 29, 1954, requiring him o appear and testify before petitioner Karl I. Zimmerman, or his uly authorized and delegated representative, and fixes the 3rd ay of June, 1954, at 10 A. M., at the United States Court House, th and Market Streets, Philadelphia, as the time and place for he hearing on the said petition.

(S.) GEO. A. WELSH,
J.

8 [File endorsement omitted]

N THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

M-1609

UNITED STATES OF AMERICA

vs.

ABRAHAM MINKER

JUDGMENT—June 3, 1954

AND NOW, to wit, this 3rd day of June, 1954, upon consideration of the Motion for Order adjudging witness ABRAHAM MINKER in contempt, and after hearing in open Court, and it having been established to the Court's satisfaction that the witness ABRAHAM MINKER did receive due and proper notice of this Court's Order of March 29, 1954, requiring him to appear before Petitioner Karl I. Zimmerman, or his duly authorized and delegated representative, and having further received due and proper notice from the aforesaid Karl I. Zimmerman, requiring his appearance before the said Karl I. Zimmerman, on May 13, 1954, and having failed to

appear on May 13, 1954, it is ORDERED, ADJUDGED AND DECREED that the said witness ABRAHAM MINKER is adjudged in contempt of this Court's order of March 29, 1954, and it is further ORDERED, ADJUDGED AND DECREED that a fine of Five Hundred ($500.00) Dollars be imposed, and it is further ORDERED, ADJUDGED AND
19 DECREED that on application of ABRAHAM MINKER a stay of execution of payment of the aforesaid fine is granted, pending disposition of this case on appeal by the United States Court of Appeals for the Third Circuit, providing notice of appeal is filed with this Court within ten (10) days hereof.

By the Court:

(S.) GEO. A. WELCH,
J.

[File endorsement omitted]

20 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

NOTICE OF APPEAL—Filed June 4, 1954

Name and address of appellant, Abraham Minker, 1954 Alsace Road, Reading, Pennsylvania.

Name and address of appellant's attorney, Jacob Kossman, Esq., 1325 Spruce Street, Philadelphia, Pennsylvania.

Offense: Contempt of Court.

Concise statement of judgment or order, giving date, and any sentence: $500.00 fine imposed on appellant on June 3, 1954.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the third Circuit from the above-stated judgment.

(S.) JACOB KOSSMAN,
Appellant's Attorney.

June 4, 1954.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DIVISION

[Title omitted]

21 DOCKET ENTRIES—Filed June 4, 1954

1. Indictment or information for Motion for order adjudging defendant in contempt filed May 27th, 1954.

2. Hearing sur rule to show cause. June 3rd, 1954.

6. Verdict or finding of guilt—Defendant adjudged in contempt June 3rd, 1954.

7. Judgment—(with terms of sentence) or order. Fine of $500.00. Entered June 3rd, 1954.

8. Notice of appeal filed—June 4th, 1954. Dated June 4th, 1954.

Attest: J. A. COMEY,
Clerk.

22 IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA, ss:

I, LEO A. LILLY, Clerk, United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed copy of the supplemental docket entries is a true copy, and I further certify that the annexed and foregoing are the original papers filed in the matter of: United States v. Abraham Minker, M-1609: 9. Stipulation of counsel that record in M-1588 be made a part of record in this case, and order of Court approving same.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Philadelphia June 10, 1954.

_____
Clerk.

Received the aforementioned paper from the Clerk, U. S. District Court, Eastern District of Pennsylvania: June 10, 1954, together with the record in M-1588 (Papers numbered 1, 2 and 3).

_____
Clerk, U. S. Court of Appeals, Third Circuit.

23 [File endorsement omitted].

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

STIPULATION—Filed June 9, 1954

It is hereby stipulated and agreed by counsel for the respective parties, that the record in the Matter of Abraham Minker, No. M-1588, be made a part of the record in this case.

(S.) G. CLINTON FOGWELL, JR., *A.U.S.A.*
for United States Attorney.
(S.) JACOB KOSSMAN,
Attorney for Abraham Minker.

So Ordered:—Filed June 9, 1954.

(S.) Geo. A. Welsh, *J.*

[File endorsement omitted]

24 In the United States District Court for the Eastern District of Pennsylvania

No. M-1588

In the Matter of
Abraham Minker

Jacob Kossman

Docket Entries

1953

1. Sept. 11. Motion of Abraham Minker to quash and set aside subpoena, filed.

Oct. 28. Argued sur motion to quash and set aside subpoena. CAV.

2. Nov. 25. Opinion, Welsh, J., denying motion to quash set aside subpoena, filed.

3. Nov. 25. Order of Court denying motion to quash and set aside subpoena filed 11-27-53. Noted and Notice Mailed.

[File endorsement omitted]

25 In United States District Court for the Eastern District of Pennsylvania

No. M-1588

In the matter of
Abraham Minker

Motion to Quash and Set Aside Subpoena—Filed September 11, 1953

The defendant, Abraham Minker, a citizen of the United States, by his attorney, Jacob Kossman, moves that the subpoena served upon him requiring him to attend and give testimony in re *himself* be quashed and set aside for the following reasons:

1. The subpoena does not disclose the nature of the investigation.
2. There is no authority or jurisdiction for an Immigration Officer to subpoena the attendance and testimony of a person who is a citizen of the United States against himself.
3. The provisions of the subpoena are unreasonable and oppressive.

(S.) Jacob Kossman,
Attorney for Petitioner.

26-27 Subpoena. Omitted. Printed side page # 4 ante.

[File endorsement omitted]

28. IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. M-1588

In the Matter of
Abraham Minker

OPINION—November 25, 1953

Welsh, J.

This is a motion to quash and set aside a District Director of Immigration and Naturalization subpoena commanding the petitioner, Abraham Minker, to appear and testify in a manner concerning himself.

Petitioner's counsel, in the first instance, contends that the subpoena authority contained in Section 235 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1225 (a), only extends to matters involving aliens and aliens and citizens coming into the United States and has no application to citizens residing in the United States. The contention, we think, is not well founded.

The pertinent language of Section 235 (a) provides: " * * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers,
29 and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the service, and to that end may invoke the aid of any court of the United States * * *" The quoted language, we think, is a clear expression of the Congressional intent. The intent is to grant to the Attorney General and the immigration officers subpoena power in matters relating to aliens and aliens and citizens coming into the United States and in matters which are material and relevant to the enforcement of the Act and the administration of the Service. Specifically, the intent, insofar as the instant case is concerned, is to grant the power to subpoena in matters which are material and relevant to the enforcement of the Act, which means of necessity matters material and relevant to the enforcement of all of the provisions of the Act, including the provision of the Act the Service is attempting to enforce here, namely, Section 340, 8 U. S. C. 1451, relating to revocation of naturalization.

Obviously, said Section deals with citizens residing in the United States as it is concerned with the revocation of the citizenship of a person who has been naturalized. Petitioner and his counsel have knowledge of the fact that the Immigration and Naturalization Service is attempting to revoke petitioner's naturalization obtained in 1945 and that the instant subpoena was issued in aid of the investigation being conducted to accomplish that purpose.

A comparison of the prior statute, 8 U. S. C. 152, and the present statute, 8 U. S. C. 1225 (a), supports the conclusion reached above that it was the intent of Congress by expanding the language in the present statute to broaden the subpoena power of the Attorney General and the Immigration and Naturalization Service so as to include the issuance of a subpoena not only in matters involving aliens and aliens coming into the United States but also in matters material and relevant to the enforcement of each and every provision of the Act of 1952. In 8 U. S. C. 152 it is provided: "* * * Any District Director of Immigration and Naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers and documents touching the right of any alien, to enter, reenter, reside in, or pass through the United States, and to that end may invoke the aid of any court of the United States; * * *" After using the words "the privilege of any person to enter, reenter, reside in, or pass through the United States", 8 U. S. C. 1225 (a) adds the words, "or concerning any matter which is material and relevant to the enforcement of this Act".

Finally, we attach no significance to the fact that the subpoena provision of the Act of 1952 is placed in that portion of the Act dealing with the inspection of aliens, in the light of the Congressional intent to extend the subpoena power to matters material and relevant to the enforcement of each and every provision of the Act, including Section 340 relating to revocation of naturalization.

Secondly, petitioner's counsel contends that the present subpoena provision, Section 235 (a), should not be construed so as to require the attendance and testimony of the party himself. The basis of the contention is that Section 235 (a) uses the word "witnesses" and a party does not fall within that category. This contention, we think, is likewise, not well founded.

Section 16, 8 U. S. C. 152, in effect prior to the enactment of Section 235 (a), 8 U. S. C. 1225 (a), likewise used the word "witnesses" and the cases decided thereunder held that said word was sufficiently broad to include the party (the alien) himself. Loufakis v. United States, 81 F. 2d 966; United States v. Parson, 22 Fed. Supp. 149, reversed on other grounds but sustained as to the aforementioned proposition in Graham v. United States, 99 F. 2d 746;

In re Estes, 86 Fed. Supp. 769 and Yanish v. Wixon, 81 Fed.
31 Supp. 499. Thus, the same construction, we feel, should be placed on the present statute.

It is argued by counsel for petitioner that the strict limitation on the scope of administrative investigations, Jones v. S.E.C., 298 U.S. 1, supports his contention that the authority to subpoena "witnesses" does not include the authority to subpoena the party himself. The answer to this argument is that a more liberal view was adopted by the Court in 1950 in the case of United States v. Morton Salt Company, 338 U.S. 632. That case shows that the power to conduct administrative investigations and incidental thereto the power to issue subpoenas to compel appearance and testimony in connection with those investigations were not limited to the same extent that judicial inquiries were limited. The adoption of this more liberal view was undoubtedly the result of increased experience with administrative investigations.

The other argument of petitioner's counsel is that if Congress wanted to grant the Service power to subpoena the party himself it could have done so by using the word "persons" instead of the word "witnesses". See Defense Production Act of 1950. In this connection we point to the fact that the subpoena provisions of the Federal Trade Commission Act and the Fair Labor Standards Act contain the word "witnesses", and it can hardly be contended that with respect to the enforcement of those Acts the right of subpoena does not flow against the person under investigation. Further, it is our thought that the failure of Congress to use the word "persons" in the subpoena provision of the Act of 1952 does not foreclose a finding that "witnesses", the word used by Congress, includes the party himself. Indeed, as has been seen above, because of the construction placed on the prior subpoena provision, 8 U.S.C. 152, and because of the now more liberal view with
32 respect to the scope of administrative investigations, the word "witnesses" as used in the Act of 1952 includes the party himself.

For reasons stated herein the motion to quash and set aside the subpoena commanding the petitioner to appear and testify in a matter concerning himself will be denied.

An order pursuant to the foregoing opinion will be entered.

In closing, it is noted that the opinion herein does not affect the right of the petitioner at the time his testimony is sought to be taken before the immigration officer to assert any right he may have under the Fifth Amendment to the Federal Constitution.

NOTE: In the quoted language of the Act on page 1 of this opinion the word used in the printed U.S.C.A. is "Chapter". In the United States Statutes at Large the word "Act". We have considered the

wording of the United States Statutes at Large as the authentic version.

33 [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Misc. No. M-1588

In the Matter of Abraham Minker

ORDER—November 25, 1953

Before WELSH, *J.*

AND NOW, to wit: November 25th, 1953, in accordance with the Opinion of the Court, it is ORDERED that the motion to quash and set aside a District Director of Immigration and Naturalization subpoena in the above matter be and the same is hereby Denied.

By the Court:

Attest:

J. A. COMEY,
Deputy Clerk.

34 [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,347

UNITED STATES

v.

ABRAHAM MINKER, APPELLANT

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Argued October 14, 1954

Before GOODRICH, KALODNER and HASTIE, *Circuit Judges*

OPINION OF THE COURT—Filed December 1, 1954

By HASTIE, *Circuit Judge.*

The contempt conviction which we review on this appeal resulted from the refusal of the appellant, Abraham Minker, a naturalized

citizen who has resided in this country for more than forty years, to honor a subpoena issued by the District Director of Immigration and Naturalization requiring appellant to appear and testify as a witness in an administrative proceeding entitled "In re Abraham Minker".

35 From the beginning it has been agreed that this administrative proceeding was the opening inquiry in a course of official action directed toward the denaturalization of Minker.[1] If probable cause for denaturalization should be found in this administrative proceeding, the appropriate officer of the Immigration and Naturalization Service would then submit his certificate and affidavit of probable cause to a United States Attorney. In normal course, the United States Attorney, armed with that affidavit and such evidence as the immigration authorities had assembled in reaching the administrative decision, would proceed, as authorized by statute to institute a formal court action against Minker seeking a decree depriving him of citizenship.

The question before us is whether the immigration officer had authority to subpoena Minker to testify in the administrative first stage of official action toward his denaturalization. The government says that Section 235(a) of the Immigration and Nationality Act of 1952[2] gives immigration officers such subpoena power.

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[1] After the issuance of the subpoena, a letter was sent appellant advising him that his attendance was commanded in order that he might give testimony "in connection with and relating to the possible institution of proceedings seeking the revocation of your naturalization in accordance with Section 340 of the Immigration and Nationality Act of 1952."

[2] 66 Stat. 198, 8 U.S.C. § 1225 (a). The subsection reads as follows:

> ". . . The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena

That section provides that ". . . any immigration officer . . .
36 shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers. . . ." It also makes this power applicable to the obtaining of testimony "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service. . . ." Certainly, the proceeding "In re Minker" was such a matter. The doubtful question is whether Abraham Minker, in his relation to "In re Minker" is a "witness" within the meaning of Section 235(a).

In our ordinary use and understanding of language, witnesses and parties are different categories of participants in an administrative or judicial inquiry. Yet, those so interested in a proceeding as to be parties do at times give evidence as witnesses. Therefore, it may be unclear on the face of a legislative enactment concerning witnesses whether parties are included. This ambiguity has appeared and has proved troublesome in cases arising under statutes which authorize the taking of depositions of "witnesses". It has frequently been held that parties and other interested persons are not covered by such statutes. *In re Denning*, 1948, 44 Del. 470, 61 A.2d 657; *Hamilton Co.* v. *Goring*, 1940, 65 R.I. 459, 16 A.2d 334; *Hubbard* v. *Haynes*, 1949, 189 Tenn. 335, 225 S.W.2d 252. We cite these cases principally for their teaching that "witness" is likely to be an ambiguous word, the meaning of which "is to be determined in each case by the attendant circumstances and context, and that there is no safe general rule that can be applied universally". See *Hubbard v. Haynes, supra*, at 338, 225 S.W.2d at 253. Approaching this case that way we find three considerations which lead us to the conclusion that "witnesses" as used in Section 235(a) should not be construed to include such a party as appellant.

In 1952 Congress rewrote the entire body of our statutory immigration and nationality laws. Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C., 1952 ed., ch. 12. The provision we now are construing is new language in the 1952 Act. The
37 section in which it appears is only one of several scattered throughout the Act in which some provision is made concerning witnesses. Therefore, it is significant that in several such sections where Congress wished to make a provision as to witnesses applicable to parties in interest, it said so. In prescribing naturaliza-

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issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

tion procedure, Congress granted the subpoena power in these terms:

> "The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization . . . For such purposes any such employee . . . is authorized . . . to require by subpena the attendance and testimony of witnesses, including petitioner, . . ." 8 U.S.C., 1952 ed. § 335(b).

Similar precision appears in the regulation of deportation procedure:

> "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses . . ." 8 U.S.C., 1952 ed., § 242(b).

Almost identical language appears in connection with the exclusion of aliens:

> "A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses." 8 U.S.C., 1952 ed., § 236(a).

Again, it is provided:

> "The Attorney General shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, including the petitioner, . . ." 8 U.S.C., 1952 ed., § 336(d).

In these circumstances the failure to make any equivalent amplification of the witness category in Section 235(a) is some indication that none was intended.

The second consideration is predicated on the fact that in Section 340 of the new immigration statute, Congress has been careful to outline a judicial procedure which must be followed to accomplish denaturalization. 8 U.S.C., 1952 ed., § 1451. Specific provision is made for an adversary proceeding to be instituted by a United States Attorney in an appropriate court. Grounds for denaturalization must be stated in a formal charge and this document must

be served upon the defendant, who shall have 60 days in which to answer. A trial follows. Congress must have believed that the administration of justice in these serious cases would be facilitated by safeguards inherent in such procedure. But, as one district judge has pointed out in a case indistinguishable from ours, "If the subpenas here were allowed to stand, the judicial procedure for the revocation of naturalization certificates would be pre-empted by administrative action, and the provisions for personal notice, sixty-day time period to answer in section 340(b) of the Act would be empty words." *Application of Barnes*, N.D. N.Y. 1953, 116 F. Supp. 464, 469. Accord, *In re Oddo*, S.D. N.Y. 1953, 117 F. Supp. 323. Of course Congress may have intended to minimize the safeguards afforded by Section 340 by compelling the citizen to be a witness against himself in an administrative pretrial. But we think such intention sufficiently unlikely to make a court reluctant to find it by an unnecessarily broad interpretation of the subpoena power conferred by Section 235(a).

Finally, we think the character of denaturalization is such that in choosing between reasonable alternative constructions of
39 statutory language, a court should incline toward the construction favorable to the person whose status is put in jeopardy. The strict construction of criminal statutes is an accepted policy of our jurisprudence designed to protect those who live under our law from possible injustice. Technically, we are not administering the criminal law in this case. But we are concerned with the administration of a sanction which in effect is gravely penal. A fine or imprisonment is the normal criminal penalty. But loss of citizenship is a far graver penalty than most fines and many prison sentences. The Supreme Court has recognized this by requiring a strictness of proof in denaturalization cases which approximates that imposed in criminal cases. *Schneiderman* v. *United States*, 1943, 320 U.S. 118; *Baumgartner* v. *United States*, 1944, 332 U.S. 665. And a court of appeals has recently held that the rule of strict construction of penal statutes applies to legislation of "punitive impact" very much like denaturalization. *Mangaoang* v. *Boyd*, 9 Cir. 1953, 205 F.2d 553. We think this is sound and salutary doctrine. Its application here is the third factor which leads us to the construction urged by appellant.

We conclude that a citizen confronted with an administrative proceeding which poses a challenge to his right to retain citizenship is not to be regarded as a "witness" within the meaning of Section 235(a) or required under that section to appear and testify against himself. We note that the learned district judge in this case was careful to say that he was not deciding what the appellant might be required to testify but merely that, in response to the subpoena, he must submit himself as a witness. However, we

think the statute does not contemplate that he must be a witness at all in an administrative inquiry instituted with a view to depriving him of citizenship. That much we decide, but no more. We neither consider nor intimate any opinion upon any of the countless other situations in which immigration officers may undertake to require by subpoena the appearance and testimony of
40 interested persons in administrative inquiries. E.g., the problem presented, under a statute now repealed, in *Loufakis* v. *United States*, 3 Cir. 1936, 81 F.2d 966.

The judgment will be reversed.

41 IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,347

UNITED STATES OF AMERICA

vs.

ABRAHAM MINKER, APPELLANT

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: GOODRICH, KALODNER AND HASTIE, *Circuit Judges.*

JUDGMENT—December 1, 1954

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest:

IDA O. CRESKOFF,
Clerk.

December 1, 1954.

[File endorsement omitted.]

42-51 Petition for rehearing covering 9 pages filed December 14, 1954 omitted from this print.

It was denied, and nothing more by order January 6, 1955.

52-55 IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed January 6, 1955

Present: BIGGS, *Chief Judge*, and MARIS, GOODRICH, KALODNER, STALEY and HASTIE, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court:

WILLIAM H. HASTIE,
Circuit Judge.

Dated: January 6, 1955.

[File endorsement omitted.]

56 Clerk's Certificate to foregoing transcript omitted in printing.

57-58 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. ——

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,
IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 7, 1955.

HAROLD H. BURTON,
Associate Justice of the Supreme Court of the United States.

Dated this 29th day of January, 1955.

59 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 625

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed April 11, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 351135 47

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 47

SALVATORE FALCONE AND JOSEPH FALCONE,
PETITIONERS,

vs.

HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 12, 1955

CERTIORARI GRANTED MAY 16, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 47

SALVATORE FALCONE AND JOSEPH FALCONE,
PETITIONERS,

vs.

HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Application of HAROLD E. BARNES, Officer in Charge of Immigration and Naturalization Service, for Process to Enforce Subpoena as to Salvatore Falcone, Civil No. 1495

Application of HAROLD E. BARNES, Officer in Charge of Immigration and Naturalization Service, for Process to Enforce Subpoena as to Joseph Falcone, Civil No. 1494

On Appeal from the United States District Court for the Northern District of New York

STATEMENT UNDER RULE 15 (b)

The above entitled actions were commenced by service of an Order to Show cause upon Joseph Falcone (R. 3) and upon Salvatore Falcone. Said Orders to Show Cause, both signed by Hon. Stephen W. Brennan, D. J., were filed with the Clerk of the Court on September 9, 1953. On September 21, 1953 Anthony S. Falcone, Esq. filed a notice of Special Appearance on behalf of Joseph Falcone (R. 11) and Salvatore Falcone.

[fol. 2] Hon. James T. Foley, D. J., by written Memorandum filed November 21, 1953, denied plaintiff's requested relief in both actions (R. 38). An order in accordance with said Memorandum was filed December 3, 1953 in Joseph Falcone (R. 49) and Salvatore Falcone actions.

Notice of Appeal on behalf of the plaintiff was filed January 15, 1954 in both Joseph Falcone (R. 52) and Salvatore Falcone actions. A Stipulation and Order extending time to file record and docket appeal in both was filed February 19, 1954 in Joseph Falcone (R. 53) and Salvatore Falcone actions.

[fol. 3] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

In the Matter of Application of HAROLD E. BARNES, Officer in Charge of Immigration and Naturalization Service, for Process to Enforce Subpoena as to Joseph Falcone

ORDER TO SHOW CAUSE—September 9, 1953

Upon reading and filing the application herein, duly verified on the 3rd day of September, 1953, praying for an order of this Court to compel compliance with a subpoena of the Officer in Charge of the Syracuse Office of the Immigration and Naturalization Service in the U. S. Department of Justice, duly served on Joseph Falcone at 519 Bleecker Street, Utica, New York, on the 18th day of June, 1953,

Now, on motion of Anthony F. Caffrey, United States Attorney, attorney for the said Harold E. Barnes, it is hereby

Ordered that the said Joseph Falcone show cause before this Court at a term thereof to be held at the Federal Court House at Albany, New York, on the 21st day of September, 1953 at 10 o'clock A. M. on said day or as soon thereafter as counsel may be heard, why he should not be ordered and directed to appear before Harold E. Barnes, Officer in Charge of the Immigration and Naturalization Service and to testify before duly authorized agents and employees of the Immigration and Naturalization [fol. 4] Service and to produce for inspection and examination evidence of the date and place of his birth, his original entry into the United States and his naturalization certificate and in default, thereof, to be punished by this Court as a contempt thereof, and it is further

Ordered that service of a copy of this order and the papers upon which it is granted on the said Joseph Falcone on or before the 16th day of September, 1953, shall be deemed sufficient.

Dated: September 9th, 1953.

Stephen W. Brennan, United States District Judge.

[fol. 5] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF HAROLD E. BARNES IN SUPPORT OF ORDER TO SHOW CAUSE

Now comes Harold E. Barnes, applicant in the above cause, by Anthony F. Caffrey, United States Attorney for the Northern District of New York, and respectfully represents to the Court as follows:

1. Harold E. Barnes is the Officer in Charge of the Immigration and Naturalization Service, United States Department of Justice, at Syracuse, New York.

2. On June 18, 1953, Frank E. Latchford was the Acting Officer in Charge at Syracuse, New York, in the absence of the Officer in Charge.

3. Under Section 340 of the Immigration and Nationality Act (8 U. S. C. 1451) an order admitting a person to citizenship may be revoked and set aside if procured by concealment of a material fact or by willful misrepresentation; and by Section 340-11, Title 8 C. F. R., the District Director of Immigration and Naturalization is required to cause an investigation to be made in appropriate cases to determine whether grounds for revocation exist.

4. There is presently under investigation by the Syracuse Office of the Immigration and Naturalization Service the Legality of the Naturalization of Joseph Falcone who was naturalized in the Supreme Court of New York at Utica on February 18, 1925, and Certificate of Naturalization No. C-2118748 was issued to him.

[fol. 6] 5. In connection with the aforementioned investigation and pursuant to the authority contained in Section 235 of the Immigration and Nationality Act (8 U. S. C. 1225) and 8 C. F. R. 287.4, Acting Officer in Charge, Frank E. Latchford issued a subpena on June 18, 1953, directing the said Joseph Falcone to appear at 304 Federal Building, Syracuse, New York, on June 23, 1952, at 10:00 AM, E. D. S. T. to give testimony before an Officer of the Immigration and Naturalization Service and to produce evidence of the date and place of his birth, his original entry into the United States, and to produce his naturalization certificate.

Attached hereto and made a part hereof as "Exhibit A" is a copy of said subpena.

6. A copy of the subpena was personally served upon the said Joseph Falcone at Utica, New York, on June 18, 1953 by Stanley W. Anderson, an investigator of the Immigration and Naturalization Service.

7. Joseph Falcone appeared at the time and place specified in the subpena and he was accompanied by counsel. The said Joseph Falcone stated his name, place of residence, date and place of birth, and that he was a naturalized citizen of the United States. He also produced for inspection a birth certificate and a certificate of naturalization which he stated related to his birth and naturalization. However, he refused to testify under oath and refused to furnish any further information or to give any testimony concerning names used by himself and other members of his family; the time, place and manner of his entry into the United States; or matters relating to his places of residence and activities in the United States after entry.

8. The testimony of the naturalized person and the documents requested are essential to the investigation [fol. 7] pending in the Syracuse Office of the Immigration and Naturalization Service.

Wherefore, applicant respectfully prays for an order of this Court directing the said Joseph Falcone to appear and testify at a time and place to be designated by the Court before an Officer of the Immigration and Naturalization service and to produce the books, papers and documents set forth in the forementioned subpena, and for such other and further relief as to the Court may seem just and proper.

Anthony F. Caffrey, United States Attorney, Attorney for Applicant.

[fol. 8] *Duly sworn to by Harold E. Barnes. Jurat omitted in printing.*

[fol. 9] EXHIBIT "A" TO AFFIDAVIT

United States of America
Department of Justice
Immigration and Naturalization Service

Office of Origin:

Syracuse, New York

Subpena

Date June 18, 1953

In re Joseph Falcone

To: Joseph Falcone
1623 Mohawk Street
Utica, New York

Pursuant to the provisions of Section 235 (a) of the Immigration and Nationality Act, you are hereby commanded to attend and give testimony as set forth below, viz:

Place of appearance: 304 Federal Bldg., Syracuse, New York

Time you are required to appear: 10:00 AM EDST

Date you are required to appear: Tuesday, June 23, 1953

You are also commanded to produce and bring with you the following books, papers, and documents, viz: evidence of your birth and of your original entry into the United States, and your naturalization Certificate. You are further commanded to make a statement before an officer of this Service at that time.

(S.) F. E. Latchford,
(Name)
Acting Officer in Charge
(Title)

[seal]

[fol. 10] Return on Service of Subpena

I hereby certify that on the 18th day of June, 1953, I served the above subpena on the witness named above by personal service at 519 Bleecker Street, Utica, New York.

(S.) Stanley W. Anderson,
(Name)
Investigator (General)
(Title)

[fol. 11] In the United States District Court for the Northern District of New York

Notice of Special Appearance

Please Take Notice that Anthony S. Falcone, Esq., attorney for Joseph Falcone, appears specially herein on behalf of Joseph Falcone in the above-entitled matter, for the purpose and only for the purpose of moving to set aside the subpoena in said matter and the service thereof, and that said Joseph Falcone does not appear generally in this matter.

Anthony S. Falcone, Attorney for Joseph Falcone, appearing specially, Office and Post Office Address, 1213-1214 First National Bank Building, Utica, New York.

To: Hon. Anthony F. Caffrey, United States Attorney, 206 Federal Building, Syracuse, New York.

[fol. 12] In the United States District Court for the Northern District of New York

Affidavit of Anthony S. Falcone in Support of Notice To Set Aside Subpoena

State of New York
County of Oneida
City of Utica ss.:

Anthony S. Falcone, being duly sworn, deposes and says:

First

That he is the attorney for Joseph Falcone in the above-entitled matter and is appearing specially herein for the purpose of this motion only to move to set aside the subpoena in this matter and the service thereof.

Second

That Joseph Falcone resides at 1623 Mohawk Street, Utica, New York.

Third

That attached hereto and made a part hereof and marked Exhibit "A" is a copy of Section 235 of the Immigration and Nationality Act (8 U. S. C. 1225).

Fourth

That attached hereto and made a part hereof and marked Exhibit "B" is a copy of a letter dated April 24, 1953 [fol. 13] addressed to Joseph Falcone and signed by H. E. Barnes requesting Joseph Falcone to appear before Mr. Stanley W. Anderson for an interview on Wednesday, April 29, 1953 at 11:00 A. M. at the Oneida County Clerk's Office, Utica, New York.

Fifth

That attached hereto and made a part hereof and marked Exhibit "C" is a copy of subpoena served upon Joseph Falcone commanding him to appear at 304 Federal Building, Syracuse, New York on Tuesday, June 23, 1953 pursuant to the provisions of Section 235 (a) of the Immigration and Nationality Act (8 U. S. C. 1225).

Sixth

That on April 29, 1953 at 11:00 A. M. in compliance with said letter (Exhibit "B"), said Joseph Falcone and his attorney, Anthony S. Falcone, deponent herein, appeared at the appointed time and place before Officer Stanley W. Anderson. That deponent questioned officer Anderson as to the reason for said hearing but said hearing officer refused to divulge its purpose but did state that he had a number of questions that he desired to ask of Joseph Falcone before a stenographer which he brought and that counsel for Joseph Falcone could object to same if he so desired.

That deponent informed Officer Anderson that since he refused to divulge the reason for this interview, that under advice of counsel his client, Joseph Falcone, would not answer any questions and that the interview was at an end.

[fol. 14]

Seventh

That on June 18, 1953, Joseph Falcone was served with a subpoena (Exhibit "C") to appear at the Federal Building, Syracuse, New York at 10:00 A. M. EDST on Tuesday, June 23, 1953, pursuant to Section 235 (a) of the Immigration and Nationality Act, (8 U. S. C. 1225), and was commanded to produce the following, viz: evidence of birth, original entry into the U. S., naturalization certificate, and was further commanded to make a statement before an officer of the Service at that time. That at the appointed time, place and date, said Joseph Falcone appeared with his attorney, Anthony S. Falcone, and John C. Smith of counsel.

Eighth

That Anthony S. Falcone, attorney for Joseph Falcone, and John C. Smith of counsel, advised the hearing officer, Stanley W. Anderson, that they were appearing specially for Joseph Falcone and not generally and respectfully objected to the jurisdiction under which said subpoena was allegedly issued by said Immigration and Naturalization Service, and read into the record Section 235 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1225), (Exhibit "A").

That nevertheless, Joseph Falcone voluntarily exhibited to said hearing officer the documents in his possession, namely his birth certificate and his naturalization certificate.

Ninth

That Section 235 of the Immigration and Nationality Act of 1952 does not apply to Joseph Falcone. That a [fol. 15] reading of said section and its subsections thereto refers to aliens only and refers particularly to any person seeking admission, readmission to or the privilege of passing through the United States or any alien who seeks to become a resident of the United States or seeks to become a citizen of the United States and does not affect Joseph Falcone who became a citizen of the United States on the 18th day of February, 1925 in the Supreme Court of Onedia County, New York.

Tenth

That deponent and John C. Smith of counsel requested a copy of the minutes taken at said hearing but said Officer Anderson refused said request upon the ground that said minutes were government property, although payment was tendered for same.

Eleventh

That the Immigration and Naturalization Service has a "sinister" plan and notice to try to provoke any cause in order to attempt to make a case for revocation of the naturalization certificate of Joseph Falcone, where in reality none exists.

Twelfth

That on June 23, 1953 during the course of the special appearance and objections as to the jurisdiction relative to the subpoena under Section 235 (b) of the Immigration and Nationality Act (8 U. S. C. 1225) as heretofore stated, Acting Officer in Charge, Frank E. Latchford, threatened said Joseph Falcone in the presence of Anthony S. Falcone, Esq. and John C. Smith, Esq., that unless said Jo- [fol. 16] seph Falcone answered all questions put to him, things would happen and go hard for him.

That these threats made by said Officer Latchford were not put into the record.

Thirteenth

That the girl stenographer who was brought into the hearing room on June 23, 1953 by the hearing officer was not a qualified legal stenographer or court reporter and when counsel requested certain portions of the objections read back, said stenographer was unable to do so and apologized stating that she was not the stenographer who usually took the minutes and was unable to fully repeat what had taken place.

Fourteenth

Upon information and belief that the Immigration and Naturalization Service has, for upwards of one year, investigated the facts relating to the naturalization of Joseph Falcone and has been unable to find any fraud or a misstatement of a material fact.

Fifteenth

That the dilatory acts of the Immigration and Naturalization Service, through coercion, force, duress, fear, and now with the added weapon of "contempt", is an entrapment and an inquisition and certainly a very undemocratic practice.

Sixteenth

That if the Immigration and Naturalization Service did have any ground for a petition of revocation, it would have proceeded with the same directly instead of using [fol. 17] the sinister methods and tactics of entrapment, coercion, fear, threats, and under undemocratic and unconstitutional practices by said service on a "fishing expedition".

Seventeenth

That the burden of proof is upon the Immigration and Naturalization Service to show a fraud or misstatement of a material fact in order to petition for a revocation, and not upon a citizen of the United States that he has not done so, as the Department of Justice, Immigration and Naturalization Service is attempting to accomplish.

Nineteenth

That Exhibits "A", "B", "C" are relevant and material to the matter before the Court and have been incorporated herein for the purpose of assisting the Court to better understand and to perceive the sinister, undemocratic and unconstitutional tactics used by the Immigration and Naturalization Service in order to try to entrap, coerce, ridicule, force and intimidate the said Joseph Falcone.

Twentieth

Upon information and belief that the hearing officer, Stanley W. Anderson, is a prejudiced person; That it has come to the attention of deponent that said officer has stated on various occasions that "the Falcones and all Italians should be put on a boat and sunk in the middle of the Atlantic Ocean".

Twenty-first

That by reason of the facts above stated, said Harold E. Barnes, Officer in Charge of the Immigration Service, [fol. 18] the Immigration and Naturalization Servic Department of Justice, have no jurisdiction to issue and enforce the subpoena as to Joseph Falcone who is an American citizen naturalized on February 18th, 1925 in the Supreme Court of the County of Oneida, New York.

Anthony S. Falcone

Sworn to before me this 17th day of September, 1953. Gladys F. Leszczynski, Notary Public, in the State of New York, Appointed in Oneida County, My Commission Expires March 30, 1955.

EXHIBIT "B" TO AFFIDAVIT

Form 7-7
Rev. 12/10/51

United States Department of Justice
Immigration and Naturalization Service
Syracuse, New York
April 24, 1953

In reply
refer to:
2310-P-4542

Mr. Joseph Falcone
1623 Mohawk St.
Utica, N. Y.

Dear Sir:

Please call at the office named below, at the time and date indicated, for interview in connection with an official matter.

[fol. 19] It is important that you appear as requested.

Please bring this letter with you.

Very truly yours: (Sgd.) H. E. Barnes, Officer in Charge.

Place: County Clerk's Office, Utica, N. Y.
Date and Hour: Wednesday, April 29, 1953 at 11 A. M.
Ask for: Mr. Anderson.
Reason for appearance: For an interview.
Bring with you: This letter.

EXHIBIT "C" TO AFFIDAVIT

United States of America

Department of Justice

Immigration and Naturalization Service

Office of Origin: Syracuse, New York.

Subpena

Date June 18, 1953.

In re Joseph Falcone

To: Joseph Falcone, 1623 Mohawk Street, Utica, New York.

Pursuant to the provisions of Section 235 (a) of the Immigration and Nationality Act, you are hereby commanded to attend and give testimony as set forth below, viz:

Place of appearance: 304 Federal Bldg., Syracuse, New York.

Time you are required to appear: 10:00 A. M. EDST.

Date you are required to appear: Tuesday, June 23, 1953.

[fol. 20] You are also commanded to produce and bring with you the following books, papers, and documents, viz: evidence of your birth and of your original entry into the United States, and your naturalization Certificate. You are further commanded to make a statement before an officer of this Service at that time.

(Sgd.) F. E. Latchford, Acting Officer in Charge.

(Seal.)

Return on Service of Subpena

I hereby certify that on the — day of ——, 19—, I served the above subpena on the witness named above by —— ——

—— —— (Name), —— —— (Title).

[fol. 21] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

In the Matter of Application of HAROLD E. BARNES, Officer in Charge of Immigration and Naturalization Service, for Process to Enforce Subpoena as to Salvatore Falcone

ANSWERING AFFIDAVIT OF ANTHONY S. FALCONE

STATE OF NEW YORK,
County of Oneida,
City of Utica, ss:

Anthony S. Falcone, being duly sworn, deposes and says:

First

That he is the attorney for Salvatore Falcone in the above-entitled matter and is appearing specially herein for the purpose of this motion only to move to set aside the subpoena in this matter and the service thereof.

Second

That Salvatore Falcone maintains his residence at 5669 N. W. 7th Avenue, Miami, Florida and has resided there for upwards of eight years.

Third

That attached hereto and made a part hereof and marked [fol. 22] Exhibit "A" is a copy of Section 235 of the Immigration and Nationality Act (8 U. S. C. 1225).

Fourth

That attached hereto and made a part hereof and marked Exhibit "B" is a copy of a letter dated April 24, 1953 addressed to Joseph Falcone and signed by H. E. Barnes requesting Joseph Falcone to appear before Mr. Stanley W. Anderson for an interview on Wednesday, April 29, 1953 at 11:00 A. M. at the Oneida County Clerk's Office, Utica, New York.

That Salvatore Falcone received a similar letter requesting him to appear for an interview on the same date and at the same time, that is April 29, 1953 at 11:00 A. M., before

a Mr. Turman and Mr. Baker at the Immigration Building in Miami, Florida.

Fifth

That attached hereto and made a part hereof and marked Exhibit "C" is a copy of subpoena served upon Salvatore Falcone commanding him to appear at 304 Federal Building, Syracuse, New York on July 3, 1953 pursuant to the provisions of Section 235 (a) of the Immigration and Nationality Act (8 U. S. C. 1225).

Sixth

That attached hereto and made a part hereof and marked Exhibit "D" is a copy of the minutes taken at the hearing which took place on July 3, 1953 at the Federal Building, Syracuse, New York in compliance with the subpoena hereto annexed and marked Exhibit "C", hereto annexed.

[fol. 23] Seventh

That during June and July of the year 1952, officers of the Immigration and Naturalization Service of Miami, Florida called at the residence of Salvatore Falcone at 5609 N. W. 7th Avenue, Miami, Florida on three separate occasions seeking said Salvatore Falcone. That on each occasion, said officers were advised by Salvatore Falcone's son that he was visiting in Utica, New York with his son, deponent herein, and could be located at 1652 Conkling Avenue, Utica, New York.

That said officers advised Salvatore Falcone's son in Miami that he should inform his father as soon as he returned to the city to have him contact the Immigration Bureau concerning a matter of the utmost importance and also to bring with him at the time his naturalization certificate.

That Salvatore Falcone returned to Miami, Florida on or about the 20th day of September, 1952 and upon being advised by his son that he was wanted at the Immigration Bureau, he personally went down to said office.

That Salvatore Falcone was advised at said Immigration Bureau that they had a report stating he was an alien. Salvatore Falcone stated he was an American citizen and voluntarily produced his certificate of naturalization. They

took certain notes of that interview and thanked him for the courtesy of calling at their office.

Eighth

That on April 29, 1953 at 11:00 A. M. in compliance with a letter requesting an interview as hereinbefore mentioned, Salvatore Falcone accompanied by counsel, Henry L. Balaban of 117 N. E. 1st Avenue, Miami, Florida, appeared [fol. 24] before Immigration Officers Turman and Baker at the Federal Building in Miami, Florida; that at that time the said officers were advised that Anthony S. Falcone of Utica, New York, deponent herein, was the attorney for Salvatore Falcone and that Attorney Balaban was acting as counsel.

The said officers explained that the reason for this interview was at the request of the Syracuse, New York immigration office; that they desired to have an explanation from Salvatore Falcone as to the reason for the use of the name of Projelto by his family when they arrived into the United States in the year 1907. That Salvatore Falcone replied that he could not give them any reason because to his knowledge he came into this country in that year under the name of Falcone,—that he got married in the year 1911 under the name of Falcone,—that his children were all given the surname of Falcone,—that he has always been known by the name of Falcone. That the only persons who could have explained the reason for any other name used at the time of entry into this country would have been Salvatore Falcone's father, Antonio Falcone, or Maria Falcone, his mother, who brought Salvatore Falcone into this country with them in the year 1907, but unfortunately both parents have passed away.

That said officers again requested to see his naturalization certificate and birth certificate to which request Salvatore Falcone readily obliged.

Ninth

That since Salvatore Falcone has been a resident of Miami, Florida, each year during the summer months he comes north to the City of Utica, New York to visit with his son, Anthony S. Falcone, deponent herein, and resides with

[fol. 25] him at 1652 Conkling Avenue. That Salvatore Falcone is an ill man suffering with a serious heart ailment and a diabetic condition.

Tenth

That on June 30, 1953, Salvatore Falcone was served with a subpoena (Exhibit "C") to appear at the Federal Building in Syracuse, New York at 10:00 A. M. EDST on Friday, July 3, 1953 and was commanded to produce the following, viz: evidence of birth, original entry into the U. S., naturalization certificate and was further commanded to make a statement before an officer of the Service at that time. That at the appointed time, place and date, said Salvatore Falcone appeared with his attorney, Anthony S. Falcone, and John C. Smith of counsel.

Eleventh

That Anthony S. Falcone, attorney for Salvatore Falcone, and John C. Smith of Counsel, advised the hearing officer, Mr. Anderson, that they were appearing specially for Salvatore Falcone and not generally and respectfully objected to the jurisdiction under which said subpoena was allegedly issued by said Immigration and Naturalization Service, and read into the record Section 235 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1225), (Exhibit "A").

That Mr. Anderson asked Salvatore Falcone for the certificate of naturalization and birth certificate and for the third time, Salvatore Falcone exhibited the same to him.

Twelfth

That due to the fact that the Immigration and Naturaliza-[fol. 26] tion Service refused to furnish the attorney for Joseph Falcone with a copy of the minutes taken at the hearing of Joseph Falcone, said Anthony S. Falcone and John C. Smith brought with them into the hearing room an Official Court Stenographer to take the minutes of the hearing held for Salvatore Falcone, a copy of which is attached hereto and marked Exhibit "D".

Thirteenth

That Section 235 of the Immigration and Nationality Act of 1952 does not apply to Salvatore Falcone. That a reading of said section and its subsections thereto refers to aliens only and refers particularly to any person seeking admission, readmission or the privilege of passing through the United States or any alien who seeks to become a resident of the United States or seeks to become a citizen of the United States and does not affect Salvatore Falcone who became a citizen of the United States on the 21st day of July, 1925 in the Supreme Court of Oneida County, New York.

Fourteenth

That the Immigration and Naturalization Service has a "sinister" plan and motive to try to provoke any cause in order to attempt to make a case for revocation of the naturalization certificate of Salvatore Falcone, where in reality none exists.

Fifteenth

Upon information and belief that the Immigration and Naturalization Service has, for upwards of one year, investigated the facts relating to the naturalization of Salva- [fol. 27] tore Falcone and has been unable to find any fraud or a misstatement of a material fact.

Sixteenth

That the dilatory acts of the Immigration and Naturalization Service, through coercion, force, duress, fear, and now with the added weapon of "contempt", is an entrapment and an inquisition and certainly a very undemocratic practice.

Seventeenth

That if the Immigration and Naturalization Service did have any ground for a petition of revocation, it would have proceeded with the same directly instead of using the sinister methods and tactics of entrapment, coercion, fear, threats, and under undemocratic and unconstitutional practices by said service on a "fishing expedition".

Eighteenth

That the burden of proof is upon the Immigration and Naturalization Service to show fraud or misstatement of a material fact in order to petition for a revocation, and not upon a citizen of the United States that he has not done so, as the Department of Justice, Immigration and Naturalization Service is attempting to accomplish.

Nineteenth

That Exhibits "A", "B", "C" and "D" are relevant and material to the matter before the Court and have been incorporated herein for the purpose of assisting the Court to better understand and to perceive the sinister, undemocratic and unconstitutional tactics used by the Immigration [fol. 28] and Naturalization Service in order to try to entrap, coerce, ridicule, force and intimidate the said Salvatore Falcone.

Twentieth

Upon information and belief that the hearing officer, Stanley W. Anderson, is a prejudiced person. That it has come to the attention of deponent that said officer has stated on various occasions that "the Falcones and all Italians should be put on a boat and sunk in the middle of the Atlantic Ocean."

Twenty-first

That by reason of the facts above stated, said Harold E. Barnes, Officer in Charge of the Immigration Service, the Immigration and Naturalization Service, Department of Justice, have no jurisdiction to issue and enforce the subpoena as to Salvatore Falcone who is an American citizen naturalized on July 21, 1925 in the Supreme Court of the County of Oneida, New York.

Anthony S. Falcone.

Sworn to before me this 17th day of September, 1953. Gladys F. Leszczynski, Notary Public, in the State of New York. Appointed in Oneida County. My Commission Expires March 30, 1955.

[fol. 29] EXHIBIT "C" TO AFFIDAVIT

United States of America

Department of Justice

Immigration and Naturalization Service

Office of Origin:
Syracuse, New York

Subpena

Date June 30, 1953

In re Salvatore Falcone

To: Salvatore Falcone
1623 Mohawk St.,
1652 Conkling Avenue,
Utica, New York

Pursuant to the provisions of Section 235(a) of the Immigration and Nationality Act, you are hereby commanded to attend and give testimony as set forth below, viz:

Place of appearance: 304 Federal Building, Syracuse, New York

Time you are required to appear: 10:00 a.m. EDST

Date you are required to appear: Friday, July 3, 1953

You are also commanded to produce and bring with you the following books, papers, and documents, viz: evidence of your birth and of your original entry into the United States, and your naturalization certificate. You are further commanded to make a statement before an officer of this Service at that time.

(sgd) H. E. Barnes
Officer in Charge

(Seal)

[fol. 30] Return on Service of Subpena

I hereby certify that on the day of 19 , I served the above subpena on the witness named above by

(Name)

(Title)

Exhibit "D" To Affidavit

In the Matter of
Salvatore Falcone

Hearing July 3, 1953

In Naturalization Offices
Room 309 Federal Building
Syracuse, New York
Before Stanley W. Anderson, and
Immigration Reporter (Wilcox)

Appearances:

Anthony Falcone, John C. Smith (Of Counsel).
Transcript of testimony
Leland J. Twinem
Acting Reporter

Salvatore Falcone, present and not sworn.

Direct Examination

By Mr. Anderson:

Q. What is your name?

[fol. 31] Mr. Smith: He refuses to answer any questions.

Mr. Anderson: My question was, "What is your name?" He refuses to answer, is that correct, Mr. Smith?

Mr. Smith: That's correct. Now, Mr. Anderson, the same objection that I made in the Joseph Falcone matter

is going to be presented here at this time in Salvatore Falcone matter.

Mr. Anderson: Pardon me, this is Salvatore.

Mr. Smith: Salvatore. My name is John C. Smith: I am an attorney duly qualified to practice in the courts of the United States. My office is at 1603 State Tower Building, Syracuse, New York. I appear as counsel for Mr. Anthony Falcone who is the attorney for Salvatore Falcone who resides at 5609 Northwest 7th Avenue, Miami, Florida to whom the subpoena was issued dated June 30th, 1953 to appear before a United States Immigration official pursuant to the provisions of Section 235 (A) of the Immigration and Nationality Act and I assume that I am appearing before Mr. Anderson who is duly qualified as such under the Immigration and Nationality Laws. Now sir, I object to the use of the subpoena issued to Salvatore Falcone on the ground that provisions of Section 235 (A) of the Immigration and Nationality Act do not apply to Mr. Salvatore Falcone. The section refers to aliens only and refers particularly to any person seeking admission, re-admission or the privilege of passing through the United States, or any aliens who seek to become a resident of the United States and it does not affect Mr. Salvatore Falcone who became a citizen of the United States on the 21st day of July 1925 in the Supreme Court of the State of New York, [fol. 32] held at Rome, New York; on the further grounds that in the month of September 1952, officials of the Immigration and Naturalization service at Miami, Florida requested and did see the certificate of naturalization of said Salvatore Falcone on the ground they had reports that he was an alien; on the further grounds, sir, that on or about April 24th, 1953 he was again notified by mail to appear at the Miami Immigration and Naturalization Service Building for an interview to be held on April 29th 1953 and at that time Salvatore Falcone appeared at the hour and day with counsel Henry L. Balaban of Miami and he was there interviewed by officials Thurman and Baker who advised him that the interview was held at the request of the Syracuse, New York office. We reiterate that Mr. Falcone is a citizen of the United States, does not come under the jurisdiction of that Section and Act and, therefore, we refuse to be questioned under any of the grounds.

I may add, Mr. Falcone is a very sick man, he is diabetic and has a very serious heart condition and that any excitement or some amount of worry makes him very ill.

With that, we close, sir.

Mr. Anderson: Section 235 (A) of the Immigration and Nationality Act also provides that the Attorney General and any immigration officer, including Special Inquiry officers, have the power to require by subpoena the attendance and testimony of witnesses before immigration officials and special inquiry officials and the production of books, papers and documents relating to the privilege of any person to enter, re-enter, reside in or pass through the United States or concerning any matter which is material [fol. 33] and relevant to the enforcement of this Act and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpoena issued under the Act or refuses to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a result thereof.

Mr. Smith: Who was the subpoena served by?

Mr. Anderson: Served by me on Mr. Salvatore Falcone at Forestport, New York on June 30, 1953 by personal service and directs his appearance at 10:00 A. M. Eastern Daylight Saving Time on Friday July 3, 1953 at 304 Federal Building, Syracuse, New York; to produce and bring with him evidence of his birth and of his original entry into the United States and his naturalization certificate.

Mr. Anderson:

Q. Did you, Mr. Falcone, bring with you any or all of these documents today?

Mr. Smith: Just a minute, we have, for a second time we are herewith producing and showing you his naturalization papers.

(Same produced).

Mr. Anderson: Certificate of Naturalization =2120606 issued on petition =4541 to Salvatore Falcone then residing at 515 Bacon Street, Utica, New York who was then 33 years of age, five feet, six inches in height, color white, complexion light, eyes blue, hair gray, no visible distinguishing marks, former subject of Italy, naturalized at a special term of the Supreme Court of Oneida County at Rome, New York on July 21, 1925. The document in question bears a rubber stamp endorsement on the reverse to the effect that a passport was issued by the Department of State on December 11, 1936 and the naturalization certificate is returned to Mr. Smith.

Mr. Smith: This exhibit together with the next exhibit is being offered and shown to you voluntarily and not because of the subpoena. I show you his birth certificate.

Mr. Anderson: Birth certificate in the Italian language certifying to the birth of Salvatore Falcone son of Antonio and Maria Sclafani in Sciacca on August 21, 1891, issued on May 25, 1953 in the Commune Di Sciacca Province of Agrigento and that's returned to Mr. Smith.

The subpoena which was served by me on Mr. Salvatore Falcone on June 30, 1953 at Forestport, New York by personal service also commanded Mr. Salvatore Falcone to make a statement before an officer at the time specified for the return of the subpoena——

Q. Are you, Mr. Salvatore Falcone, prepared to make such a statement at this time?

Mr. Smith: Mr. Salvatore Falcone on the advice of his attorney and counsel at this time is advised that he does not and is not required to make such a statement because we still contend that the subpoena is not binding on Mr. [fol. 35] Falcone for the reasons previously stated.

Mr. Anderson: Is that all, Mr. Smith?

Mr. Smith: That's it.

Mr. Anderson: All right, I wih close the interview.

I Hereby Certify that the foregoing transcript was taken by me in the form of shorthand notes and later personally reproduced by me in present typewritten form.

I Further Certify the same to be a true and accurate transcription to the best of my knowledge and ability.

Leland J. Twinem, Official Municipal Court Reporter, Onondaga County Court House, Syracuse, New York.

[fol. 36] In The United States District Court For The Northern District of New York

In the Matter of

Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for process to enforce subpoena as to Salvatore Falcone.

In the Matter of

Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for process to enforce subpoena as to Joseph Falcone.

Order to Photostat Naturalization Records —Oct. 28, 1953

An application having been made by Harold E. Barnes, for process to enforce subpoena as to Salvatore Falcone and Joseph Falcone and said matter having been duly returnable before me and having been argued before me on the 21st day of September, 1953, the records of the Oneida County Clerk having to do with the naturalization of Salvatore Falcone and Joseph Falcone having been subpoenaed before me on said date and it appearing that it is proper and necessary for the disposition of this matter that photostatic copies thereof be made and provided to the Court and to respective counsel.

[fol. 37] Now, on motion of Anthony F. Caffrey, United States Attorney and upon the consent of Anthony S. Falcone, attorney for each of the above-named persons, it is hereby

Ordered that the Oneida County Clerk make or permit the making of photostatic copies in triplicate of page 42 and 43 and the papers attached thereto of Volume 20 of

The first contention of the immigration service in these applications is that the subpena power used against these naturalized citizens is authorized and delegated by the Congress in this particular part of the terms of 235 (a) of the Act (8 USCA 1225 (a)):

> "The Attorney General and any immigration officer, including special inquiry officers shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the ad- [fol. 41] ministration of the Service to that end may invoke the aid of any court of the United States."

The subsection concludes with the conferring of jurisdiction upon the district court to order compliance with such subpena.[1]

The second contention in behalf of the applications is that despite the express confinement of the subpena as "pursuant to the provision of section 235 (a) of the Act," the power to issue the subpoenas here is implicitly authorized and granted by the terms of 287 (b) of the Act (8 USCA 1357 (b)) relating to powers of immigration officers and employees.[2]

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[1] "Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

[2] "Sec. 287 (b) Any officer or employee of the Service designated by the Attorney General, whether individually

[fol. 42] Further, inasmuch as it is now frankly stated that the legality of the naturalization of the Falcones is under investigation, the subpena power is necessary in the investigation and report as to the institution of revocation proceedings in accordance with the regulations promulgated by the attorney general in the administration and enforcement of the Act in that respect.[3]

These contentions create a question of statutory construction. There is no judicial authority to my knowledge directly in point and the analysis of the intent of the Congress is made difficult by the immensity of the Act itself. The importance to the administration and enforce-

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or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code."

[3] Sec. 340.11 Investigation and report. Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by willful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for a possible criminal prosecution.

is not intended by this provision to sanction the indiscriminate questioning or harassment of citizens returning to the United States, but it is to be used by the immigration officers whenever there is reason to believe that a citizen is violating or about to violate the law and is about to become expatriated. Immigration officers are also granted the power to subpena the attendance and testimony of witnesses, and the production of books, papers, and documents in aid of the enforcement of the provisions of the bill. An alien who does not appear, to the examining immigration officer, to be admissible, clearly and beyond a reasonable doubt, shall be detained for further inquiry by a special inquiry officer. * * *"

"* * * Section 287 of Chapter 8 further specifies powers of immigration officers and employees of the Immigration and Naturalization Service. * * *"

As I read this background and the section as a whole, I cannot reasonably discern an intent that would allow subpena power over naturalized citizens for the purpose of investigation to ascertain good cause for the institution of revocation proceedings. The limitation of this administrative subpena power, in my judgment, must be kept within the confines of the provisions as stated and restricted to such purpose, and there is not the slightest indication in the legislative background nor the terms of the provisions that it may be used for the investigative [fol. 46] purpose here sought against a naturalized citizen. One judicial discussion of section 235 (a), together with other related sections, indicates generally that issues of law under such section concerns only aliens and not citizens of the United States by birth or naturalization. Int. Longshoremen's Union v. Boyd, 111 F. Supp. 802. In construing these provisions I have also kept in mind that it necessarily would have punitive impact upon an important right now held by the respondents, the revocation of which might ultimately result in deportation. Such punitive impact of a statute calls for strict construction of the terms. Mangaoang v. Boyd, 205 F. (2d) 553, cert. denied November 9, 1953, 22 L. W. 3121.

The most important reason for my conclusion as to the invalidity of the subpenas comes from a reading of the Act as a whole, which the government recommends in support of its contention. A specific, detailed and exact judicial procedure is set forth in section 340 for the revocation of naturalization certificates when they were procured by concealment of a material fact or by willful misrepresentation. The pertinent part of section 340 (a) is set forth below.[5] The most striking part of this procedure, [fol. 47] which is old in the law, is contained in section 340 (b).[6] In discussing the judicial procedure as outlined

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[5] "Sec. 340 (a). It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively." * * * (8 USCA 1451)

[6] "Sec. 340 (b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States, or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

subpoena served upon him by said Officer in Charge of the Syracuse Office of the Immigration and Naturalization Service, U. S. Department of Justice, and to compel respondent to testify before duly authorized agents and employees of the Immigration and Naturalization Service and to produce for inspection and examination evidence of the date and place of birth, his original entry into the United States and his naturalization certificate, pursuant to Section 235 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. A. 1225), and in default thereof, to be punished by this Court as a contempt thereof; and said respondent, Joseph Falcone, having appeared specially through his attorney, Anthony S. Falcone, Esq., and the argument on said motion having duly and regularly come on to be heard on said date, and on reading and filing the said order to show cause granted by the Hon. Stephen W. Brennan, United States Federal District Judge, dated September 9, 1953, and affidavit of Harold E. Barnes, verified on the 3rd day of September, 1953, and the notice of special appearance by respondent, Joseph Falcone, and the answering affidavit of Anthony S. Falcone, Esq., attorney for said respondent, with exhibits attached thereto, verified the 17th day of September, 1953, and after hearing Anthony F. Caffrey, United States Attorney on behalf of the Immigration and Naturalization Service, U. S. Department of Justice, and after hearing Anthony S. Falcone, Esq., attorney for respondent, Joseph Falcone, and said respondent having subpoenaed before me his naturalization record and order duly admitting him to citizenship which are contained in Volume 20, page 43 of said records on file at the Oneida County Clerk's office at Utica, New York, and upon the memorandum decision [fol. 51] made by this Court dated November 20, 1953 and filed with the United States District Clerk's office for the Northern District of New York in the City of Utica, New York on November 21, 1953, and upon the amended portion of said memorandum decision filed at said Federal District Clerk's Office on November 24, 1953, and upon all of the proceedings had heretofore, and after due deliberation having been had thereon, it is hereby

Ordered that the application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service,

for process to enforce subpoena as to Joseph Falcone is hereby denied and dismissed.

Dated: Utica, New York
December 3, 1953.

James T. Foley, United States District Judge.

[fol. 52] In United States District Court, Northern District of New York

Notice of Appeal—January 14, 1954

Notice is hereby given that Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, applicant above named, hereby appeals to the Court of Appeals for the Second Circuit from the judgment entered in this action on the 3rd day of December, 1953.

Dated: January 14th, 1954.

Theodore F. Bowes, United States Attorney, Attorney for Appellant, Office and Post Office Address, Federal Building, Syracuse 1, New York.

To: Glen A. Porter, Clerk, U. S. District Court, Federal Building, Utica, New York.

Anthony S. Falcone, Attorney for Joseph Falcone, 1213 First National Bank Building, Utica, New York.

[fol. 53] In United States District Court, Northern District of New York

Stipulation Extending Time and Order Thereon

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties herein that the appellants having filed their Notice of Appeal on January 15th, 1954, the time for appellant to file its record on appeal and to docket the appeal be and the same hereby is extended from February 24, 1954 to and including April 14, 1954 and the time for appellant to serve and file its designa-

tion of contents of the record on appeal pursuant to Rule 75 of the Rules of Civil Procedure be and the same hereby is extended to and including April 5th, 1954.

Dated: February 19, 1954.

Theodore F. Bowes, Attorney for Appellant; Anthony S. Falcone, Attorney for Appellee.

So Ordered: Stephen W. Brennan, Judge, U. S. District Court.

[fol. 54] In the United States District Court for the Northern District of New York

[Title omitted]

Stipulation as to Record on Appeal—March 23, 1954

It is stipulated and agreed by the parties that the record on appeal in both captioned cases shall consist of,

1. Order to Show Cause with affidavit and subpoena attached thereto in the case of Joseph Falcone.

2. Printing of order to show cause, affidavit and subpoena in the case of Salvatore Falcone is waived since the facts are substantially as set forth in the moving papers relating to Joseph Falcone, except that Salvatore Falcone was duly naturalized in the Supreme Court of New York at Rome on [fol. 55] July 21, 1925, and Certificate of Naturalization No. 2120666 was issued to him.

3. Notice of special appearance with affidavit and exhibits "B" and "C" attached thereto in the case of Joseph Falcone. Printing of exhibit "A" attached to the affidavit is waived.

4. Printing of the notice of special appearance and exhibits "A" and "B" in the case of Salvatore Falcone is waived since contents are the same as set forth in the moving papers of Joseph Falcone. Answering affidavit of Anthony S. Falcone and exhibits "C" and "D" attached thereto are to be printed.

5. Order to photostat naturalization records of respondents-appellees.

6. Photostatic copies of naturalization records of Joseph

Falcone and Salvatore Falcone will be furnished the Court as exhibits at time of argument.

7. Decision of Honorable J. T. Foley.

8. Order denying application to enforce subpoena in the case of Joseph Falcone.

9. Printing of order denying application to enforce subpoena in the case of Salvatore Falcone is waived since contents are same as in the case of Joseph Falcone.

10. Notice of appeal in the case of Joseph Falcone.

11. Printing of Notice of appeal in the case of Salvatore Falcone is waived as contents are same as in the case of Joseph Falcone.

12. Stipulation extending time to docket appeal in the case of Joseph Falcone.

13. Printing of stipulation extending time to docket appeal in the case of Salvatore Falcone is waived as the contents are the same as in the case of Joseph Falcone.

14. This stipulation.

[fol. 56] 15. Stipulation as to certification of record.

Theodore F. Bowes, Attorney for Applicant-Appellant; Anthony S. Falcone, Attorney for Respondents-Appellee.

Dated March 23rd, 1954.
Filed 3/24/54.

[fol. 57] In United States District Court, Northern District of New York

Stipulation as to Certification

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the District Court in this case, as agreed on by the parties.

Dated, Syracuse, N. Y., April —, 1954.

Anthony S. Falcone, Attorney for Appellee; Theodore F. Bowes, United States Attorney, Attorney for the Appellant.

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

the naturalization record of the Oneida County Supreme Court now on file in the office of the Oneida County Clerk.

Dated: October 28, 1953.

(S.) James T. Foley, United States District Judge.

[fol. 38] In United States District Court, Northern District of New York

Appearances:

Anthony F. Caffrey, United States Attorney, Northern District of New York, Attorney for Applicants, Federal Building, Syracuse, New York.

Anthony S. Falcone, Esq., Attorney for Respondents, 1213 First National Bank Building, Utica, New York.

Herman I. Bransé, Esq., Immigration & Naturalization Service, On the Brief.

Before: Hon. J. T. Foley—D.J.

Memorandum Decision of Foley, J.—November 20, 1953

These applications present a novel and important problem concerning administrative and investigative functions under the provisions of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 USCA 1101. The two separate applications are similar enough in factual background, nature and purpose to be discussed as one.

Joseph and Salvatore Falcone are naturalized citizens of the United States. Joseph Falcone assumed such [fol. 39] status by an order of the Supreme Court of the State of New York, Oneida County, on February 18, 1925, and Salvatore Falcone was duly admitted to citizenship by order of the same court, dated July 21, 1925. The Falcones came into this country on December 8, 1907, with their parents, who are now deceased, and at the time of entry Joseph was four years of age and Salvatore was sixteen.

A short time previous to the issuance of the subpoena here in question, each respondent received letters from immigration officials requesting that they appear at cer-

tain times and places for interview. The details of such interviews are not important except to note that Salvatore was more cooperative in the interview procedure than Joseph. He was asked to explain the reason for the use of the name Projelto by his parents when they entered the country and he answered he had no explanation because his father and mother were dead and he had always used and was known by the name Falcone. Joseph would not answer any questions when informed by the immigration officer that the reason for the interview would not be stated.

The result of this attitude on the part of the Falcones was the service upon them of separate subpoenas, one signed by an officer-in-charge and the other by an acting officer-in-charge of the Immigration and Naturalization Service. Each subpoena commanded them to appear on certain dates at the Federal Building in Syracuse, New York, to give testimony and make a statement before an officer of the service at the designated time and place, and further commanded each to produce and bring with them evidence of birth and original entry into the United States and naturalization certificate. Each subpena was entitled only "In re Salvatore Falcone" and "In re Joseph [fol. 4] Falcone;" each subpena specifically stated that it was pursuant to the provisions of section 235 (a) of the Immigration and Nationality Act. The respondents appeared pursuant to the subpenas and both refused to testify under oath, claiming that the subpenas were invalidly issued as against them because they were naturalized citizens and not aliens. Each produced for inspection their birth certificate and certificate of naturalization. Upon the return of the order to show cause, the respondents appeared specially, challenging the power to issue subpenas as against them under the terms of section 235 (a) of the Act. At the hearing upon such return, the official records of the Oneida County Clerk were subpenaed into court by the respondents and disclosed that the certificate of arrival or original entry demanded in each subpena are matters of official record as part of the naturalization proceedings and available to the Immigration service, although not open, as I understand it, to public inspection

ment of the Act is evident because it would ease the burden of investigations in such situations as here, but such reason of expediency cannot prevail if the subpena power exercised is in excess of the statutory grant. The authority of Congress to delegate the subpena power to administrative agencies is clearly established, even to the extent that it may delegate effective power to investigate violations of its own laws. However, the subpena power must remain [fol. 43] within the bounds of the legislative grant, not overreach the authority granted by Congress, and in investigatory matters should be conferred in express and explicit terms for that purpose. Harriman v. ICC, 211 U. S. 407; Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186, 201, 217; National Labor Board v. Anchor Rome Mills, 197 F. (2d) 447, 449. In my own judgment, subpenas should not issue upon hit or miss legal grounds.

In support of the first contention outlined, the government emphasizes the changes in section 235 (a) of the Act from the previous provision governing such situations as contained in section 16 of the Immigration Act of 1917 (8 USCA 152).[1] The word "alien" in the old statute was changed to "person" and a broad clause in relation to the power to subpena was added, "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." It was judicially settled under the old provision (8 USCA 152) that the subpena power could be exercised against aliens in either deportation or exclusion proceedings. Loufakis v. U. S., 81 F. (2d) 966; Graham v. U. S., 99 F. (2d) 746, reversing on other grounds U. S. v. Parson, 22 F. Supp. 149; In re Yaris, 109 F. Supp. 921, 922. Now the government says in its brief that this change and the addition in terminology in section 235 (a) are most significant and

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[1] * * * Any district director of immigration and naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States * * *"

evidence a congressional intent to enlarge the subpena power to enable immigration officers to question every [fol. 44] person, alien or citizen, in connection with the investigation of any matter under any section of the Immigration and Nationality Act. However, it is only necessary for me to decide whether these naturalized citizens under investigation as the target for possible revocation proceedings, and ultimately possible deportation proceedings, are subject to subpena under this portion of the Act. I do not think so for several reasons.

Section 235 in the body of the Act is entitled "Inspection by Immigration officers." (66 Stat. 198). In the Title of Contents it is listed under Chapter 4, "Provisions relating to Entry and Exclusion" (66 Stat. 163). In the analysis of the bill, contained in House Report No. 1365, (U. S. Code Service, 1952, pages 1709-1710), the discussion of section 235 is under the heading "Entry, Exclusion and Deportation of Aliens (Ch. 4 and Sec. 287)." Such analysis, although it pertains to other provisions of subsection 235 (a), outside that portion relied upon here by the government, gives some enlightenment as to the congressional intent of section 235:

> "* * * In conjunction with their inspection of aliens, the bill authorizes the immigration officers to board and search vessels, aircraft, railway cars or any other conveyance or vehicle in which they believe aliens are being brought into the United States. The immigration officers are empowered to administer oaths, take evidence and make a record, if necessary, concerning the enforcement of the bill with reference to the privilege of any alien to enter, pass through or reside in the United States. Any person coming to the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain, whether or not he intends [fol. 45] to remain permanently, whether, if an alien, he intends to become a citizen, and such other information as will aid the immigration officers in determining whether the person is a national of the United States or an alien, and, if the latter, whether he is subject to exclusion under any of the provisions of the bill. It

in section 15 of the Act of 1906, similar to the one we have today, Judge Van Devanter stated:

> "* * * the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors were never lawfully entitled." (Luria v. U. S. (1913), 231 U. S. 9, 24).

A citizen is entitled to have his status determined by a judicial tribunal and have the security of judicial over administrative action. Bilokumsky v. Tod, 263 U. S. 149, [fol. 48] 152; Ng Fung Ho v. White, 259 U. S. 276.

If the subpenas here were allowed to stand, the judicial procedure for the revocation of naturalization certificates would be pre-empted by administrative action, and the provisions for personal notice, sixty-day time period to answer in section 340 (b) of the Act would be empty words. The method of challenge to fraudulent naturalization is plainly prescribed and any examination of the party against whom it is directed should be in accord with the judicial process. The investigative power of the Service is an important one, and I carefully avoid any undue limitation or hampering of such power. I agree that naturalization is a privilege rather than a right and an alien who seeks this privilege must conform strictly with the requirements established by statute. U. S. v. Ness, 245 U. S. 319.

It must equally be kept in mind that under our constitution a naturalized citizen stands on equal footing with the native citizens in all respects, save that of eligibility to the Presidency. Osborn v. Bank of U. S., 22 U. S. (9 Wheat.) 738; Boyd v. Thayer, 143 U. S. 135; Luria v. U. S., 231 U. S. 9.

My outlined reasoning in relation to section 340 of the

Act is sufficient answer to the contentions that the subpena power should in this particular situation be implied as concomitant to the provisions of section 287 (b) of the Act, and 8 CFR 340.11. The issuance and form of subpenas in proceedings pending before immigration officials are set forth in 8 CFR 287.4 (a) (b).

Each application to enforce the subpena involved is denied and dismissed.

Dated: Albany, New York,
November 20, 1953.

[fol. 49] In United States District Court, Northern District of New York

At a Motion Term of the United States District Court in and for the Northern District of New York held at the Federal Court House in the City of Albany, New York on the 21st day of September, 1953.

Present: Hon. James T. Foley,
United States District Judge.

In the Matter of Appplication of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for process to enforce subpoena as to Joseph Falcone, Civil No. 1494.

Order Denying Application

The above named, Harold E. Barnes, Officer in Charge of the Syracuse, New York District Office of Immigration and Naturalization Service, U. S. Department of Justice, having obtained an order directing respondent, Joseph Falcone, to show cause at a Motion Term of this Court held at the Federal Court House in the City of Albany, New York on the 21st day of September, 1953, why an order should not be made directing said respondent, Joseph Falcone, to appear before said Harold E. Barnes, Officer in Charge of the Syracuse, New York District Office of the Immigration and Naturalization Service, U. S. Department of Justice, and to com-
[fol. 50] pel respondent, Joseph Falcone, to comply with a

[fol. 59] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Nos. 23081, 23082, 23172

Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for Process to Enforce Subpoena as to Salvatore Falcone

Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for Process to Enforce Subpoena as to Joseph Falcone

EDWARD J. SHAUGHNESSY, as District Director, Immigration and Naturalization Service, New York District, Petitioner-Appellant,

against

JOHN ODDO, Respondent-Appellee

OPINION—January 10, 1955.

Before Chase, Medina and Hincks, Circuit Judges

Appeals from orders of Judge Foley, United States District Court for the Northern District of New York, and Judge Weinfeld, United States District Court for the Southern District of New York, holding invalid and unauthorized by law subpoenas, issued by an immigration officer, under Section 235(a) of the Immigration and Nationality Act of 1952, for the discovery of evidence to support a suit [fol. 60] denaturalization, as provided in Section 340 of the 1952 Act. Reported below, *Matter of Falcone*, 116 F. Supp. 464; *In re Oddo*, 117 F. Supp. 323. Reversed.

Theodore F. Bowes, United States Attorney for the Northern District of New York, Syracuse, New York (Charles J. Miller, Ass't. U. S. Attorney, of Counsel; Herman I. Branse, Acting District Counsel Immigration and Naturalization Service, On the Brief), for applicant-appellant Harold E. Barnes.

Anthony S. Falcone, Utica, New York, for respondents-appellees Salvatore Falcone and Joseph Falcone.

J. Edward Lumbard, United States Attorney for the Southern District of New York, New York City (Harold J. Raby, Assistant United States Attorney and Lester Friedman, Attorney, Immigration and Naturalization Serv-

ice, of Counsel), for petitioner-appellant Edward J. Shaughnessy.

Kaufman & Edelbaum, New York City (Maurice Edelbaum and Seymour Teitelbaum, New York City, of Counsel) for appellee John Oddo.

MEDINA, Circuit Judge:

The sole question raised by these two appeals is whether Section 235(a) [1] of the Immigration and Nationality Act of

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[1] "Sec. 235. (a) The inspection, other than the physical and mental examination of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States, shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration

1952 (the McCarran-Walter Act), 66 Stat. 163, 198-9; 8 U. S. C. A. Sec. 1225(a), authorizes an officer of the Im- [fol. 61] migration and Naturalization Service to issue a subpoena requiring a naturalized citizen to testify, in an effort to determine if "good cause" exists for the commencement of proceedings to revoke the order admitting [fol. 62] such person to citizenship.[2]

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officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

[2] "Sec. 340. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate,

In the cases of Salvatore Falcone and Joseph Falcone, the Officer in Charge of the Immigration and Naturalization Service in Syracuse, New York, applied, on notice, to the United States District Court for the Northern District of New York for orders directing the Falcones, upon whom subpoenas had been served, and who challenged the authority of the Officer to issue the subpoenas under Section 235(a), to appear and testify. In the case of John Oddo the subpoena was issued by the District Director of Immigration and Naturalization for the New York District, Judge Dimock in the Southern District of New York made an ex parte order directing Oddo to appear and testify, and Oddo moved to vacate Judge Dimock's order. In each case it appeared that testimony was sought relative to the possibility of instituting an action in equity pursuant to the terms of Section 340 of the Immigration and Nationality Act of 1952, for a decree of denaturalization, the Falcones having been admitted to citizenship in 1925, and Oddo in 1931. Judge Foley refused to direct the Falcones to appear and testify [fol. 63] and Judge Weinfeld granted the motion to vacate, each holding that Section 235(a) authorized the issuance of subpoenas only in cases involving the entry, exclusion and deportation of aliens. The identical proposition was decided contrariwise by Judge Welsh, in the District Court for the Eastern District of Pennsylvania. *In re Minker*, 118 F. Supp. 264 (1953).

An "immigration officer" is defined in Section 101(a)(18) of the 1952 Act as "any employee or class of employees of the Service or of the United States designated by the Attorney General * * * to perform the functions of an immigration officer specified by this Act or any section thereof;" and Section 101(b)(4) defines a "special inquiry officer" as any immigration officer "who the Attorney General deems specially qualified to conduct specified classes of proceedings * * * required * * * to be conducted by or

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respectively * * *. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

before a special inquiry officer and who is designated and selected by the Attorney General * * *." The specified classes of proceedings referred to are exclusion proceedings, Section 235(b), and deportation proceedings, Section 242(b). Without pausing to spell out the details, it will suffice to say that the established method of selecting these immigration and special inquiry officers gives assurance that they have had experience in miscellaneous phases of the work of the Immigration and Naturalization Service and possess a special competence and familiarity with the wiles and devices of those seeking in one way or another to defeat the purposes of and to evade the laws governing immigration and naturalization, which are complex and highly technical.

Those who performed analogous functions under the predecessor statute, The Immigration Act of 1917, were described in Section 16 thereof, the Section which as [fol. 64] amended became Section 235(a) of the Act of 1952, as "immigrant inspectors." The heading of this old Section 16 reads: "Physical and Mental Examination of Alien Passengers; Regulations; Authorization of Inspectors to Administer Oaths; Appeal to Medical Boards and Personnel Thereof; Subpena of Witnesses and Documents; Penalty." There were no "Titles" or "Chapters" as in the subsequent 1952 Act.

Section 16 provided that: "[S]aid inspectors (the immigrant inspectors) shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States * * *" and that, "[A]ny district director of immigration and naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States, and to that end may invoke the aid of any court of the United States; and any district court within the jurisdiction of which investigations are being conducted by an immigrant inspector may * * * issue an order requiring such person to appear * * * and testify; and any failure to obey such order * * * may be punished * * * as a contempt."

There is no dispute about the fact that the provisions just referred to constituted the authority and machinery for administrative investigations by the Service under the 1917 Act, and this authority was widely and continuously exercised.

The Revisers' Notes make it plain that the new Section 235(a) of the 1952 Act, pursuant to which the Falcone and Oddo subpoenas were issued, is the successor to the old Section 16 of the 1917 Act. The amendments are so specific and clear as practically to determine the issue before us. [fol. 65] The "immigrant inspectors" are now "any immigration officer, including special inquiry officers," as defined supra, and they are given by Section 235(a) power to administer oaths and to take and consider evidence "of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service * * *." And Section 235(a) proceeds to use identical language in connection with the power of "any immigration officer, including special inquiry officers" to "require by subpena the attendance and testimony of witnesses * * * relating to the privilege of any person to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service.". As in the old Section 16 the appropriate District Courts are to direct such witnesses to appear and testify and to punish a refusal to testify as a contempt; and Section 287(b) repeats the key phrase above quoted in describing the powers of immigration officers and employees in administering oaths and taking and considering evidence.

Thus certain officers of the Service, designated by the Attorney General, and undisputedly including those who issued the subpoenas in these cases now before us, were explicitly given increased administrative investigatory powers. The counterpart of the phrase appearing in the 1917 Act is strengthened and broadened by the addition of the words "of or from any person," and "or person he believes or suspects to be an alien;" and there is added, both in the part of the section relating to the administration

of oaths and the taking and consideration of evidence and in that relating to the subpoena power and its enforcement [fol. 66] by the District Courts, as well as in Section 287(b), the new and comprehensive words "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." Surely investigations of an administrative character, conducted by the very officials who by training and experience have expert knowledge of the whole subject of immigration and naturalization, and designed not merely to procure evidence to support a denaturalization proceeding under Section 340 of the Act, but to ascertain the true facts and in many if not most cases, exonerate those under investigation, are "concerning * * * matter which is material and relevant to the enforcement" of the Act. True, the language is general, there is no specific reference to denaturalization proceedings; but the very generality of the terms of the statute compels the conclusion that the powers thus conferred may be exercised in reference to the enforcement of Section 340 of the Act, as well as that of all the rest. We are not at liberty to disregard language the import of which is so plain, simply because, in the allocation of "Titles," and "Chapters," and Section headings, the language conferring administrative investigatory powers is included in "Chapter 4—Provisions Relating to Entry and Exclusion" of "Title II—Immigration," and as part of a long section headed, "Inspection by Immigrant Officers." The historical relationship between the old Section 16 of the 1917 Act and the new Section 235(a), as well as the perfectly clear character of the added words above referred to, and their iteration, completely rule out the possibility of inadvertence, confusion or ambiguity. And it is worthy of note that the Act of 1952 was not hastily thrown together. On the contrary, it is the result of years of patient study by experts thoroughly conversant with the long history [fol. 67] of successive Acts affecting immigration and naturalization and allied matters, and having ripe experience with the practical problems with which the Service has had to grapple.

The rule of construction applicable in such cases is well

restated in *Railroad Trainmen v. B. & O. R. Co.*, 331 U. S. 519, 528-9 (1947):

> "Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *United States v. Fisher*, 2 Cranch 358, 386; *Cornell v. Coyne*, 192 U. S. 418, 430; *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348, 354. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain."

It is said that a reading of the 1952 Act as an integrated whole demonstrates that Section 235(a) was intended to be limited to entry, exclusion and deportation. But our reading of the Act in its entirety leaves us with a contrary impression. Moreover, if Section 235(a) is to be applicable only to entry, exclusion and deportation, as held below, what becomes of the words "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service"? Are these significant words to be left hanging in the air, as it were, and given no effect whatever?

Aside from the argument based upon the heading of Section 235(a) and the inclusion of the administrative subpoena power in Title II of the 1952 Act, relating to Immigration, and that concerning denaturalization proceedings in Title III on Nationality and Naturalization, the principal contentions of respondents stem from the difference in [fol. 68] nature between administrative and judicial proceedings and the various provisions of the Act and the Regulations which implement it. Thus it is noted that, pursuant to the terms of Section 340, it is the duty of "the United States district attorneys for the respective districts"

to institute "upon affidavit showing good cause therefor" proceedings seeking an order of denaturalization, that such proceedings are judicial in character, that the party thus sued shall have sixty days personal notice in which to answer the petition; and it is said that, if the subpoena power contended for here by the government were sustained, "the judicial procedure for the revocation of naturalization certificates would be pre-empted by administrative action." It seems to be thought that the nature of adversary proceedings of a judicial nature is such that the rights of the United States as petitioner in a denaturalization proceeding, as to discovery and other procedural matters, should be on a parity with those of the respondent therein, despite the special interest of the government in matters relating to immigration and naturalization and the undoubted power of the Congress to make provision for investigations by government officials preliminary to the commencement of action in court. Moreover, it is said that Section 235(a) and Section 335(b) of the Act are duplicitous, and that this very alleged duplicity gives rise to an inherent ambiguity.

There is no question whatever about the fact that the investigations sought to be pursued by the issuance of these subpoenas are administrative in character and that a denaturalization proceeding is unqualifiedly judicial. But this presents no inconsistency; nor do we find that Sections 235(a) and 335(b) impinge upon one another in any way. Section 235(a) is purely administrative, as we have already observed. But Section 335(b) relates to proceedings for [fol. 69] naturalization, which have since very early times been held to be judicial in character. The subpoena powers given in Section 335(b) are incidental to these judicial proceedings, and this is made clear by the language of the section to the effect that, upon a refusal by any person to obey a subpoena, any employee of the Service designated for the purpose by the Attorney General "may invoke the aid of any court exercising naturalization jurisdiction as specified in section 310 of this title; and any such court may in the event of neglect or refusal to respond," require such person to appear and testify, and, upon further failure of compliance, punish for contempt. Section 310 enumerates the state courts as well as the federal courts in which judicial proceedings for naturalization may be instituted. Thus, the

careful integration of the 1952 Act indicates that its several parts are closely articulated into a comprehensive, smoothly functioning whole. After the filing of a petition for naturalization, all examinations and investigations by the officers and employees of the Service designated for that purpose by the Attorney General are conducted pursuant to powers defined and described in Section 335(b). The statute and the subject matter of immigration and naturalization are sui generis; and the exercise of these administrative and judicial investigatory powers side by side and pari passu is, it seems to us, clearly envisioned by the pattern of the statute.

That administrative investigations may be and are often intended to serve as preliminaries to adversary proceedings of a judicial character to which the United States is a party is more or less of a commonplace, where such investigations will serve the public interest. See, e.g., Internal Revenue Code § 7602 (1954); Atomic Energy Act, 42 U. S. C. A. § 1812(a) (3); Civil Aeronautics Act, 49 U. S. C. A. §§ 642, [fol. 70] 644(b), 459, 487; Securities Act, 15 U. S. C. A. § 78(u); Public Utility Holding Company Act, 15 U. S. C. A. § 79(r). As stated by Mr. Justice Jackson, writing for the Supreme Court, in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642-3 (1950):

> "The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence, but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law."

In view of the broad general language of Section 235(a) it does not seem to us surprising that no reference is made in Section 340 to the administrative investigatory powers which the Service now seeks to exercise. Nor do we find anything improperly included in or omitted from the Regulations, now so clearly integrated with the various sections of the Act. There is no point in merely repeating in the Regulations something already apparent on the face of the statutes. Naturally, the Regulations affecting "Procedural and Other Non-substantive Provisions" of Section 235(a) relate to the sort of detailed run-of-the-mill practical problems arising from day to day in connection with immigration inspections.

Moreover, Regulation §340.11 [8] seems to tie in perfectly [fol. 71] with the interpretation we have given of Section 235(a) as conferring new and broad administrative investigatory powers upon immigration officers delegated by the Attorney General to exercise these powers. Thus "whenever it appears that any grant of naturalization may have been procured by concealment or wilful misrepresentation, the facts shall be reported to the district director having jurisdiction * * *." Moreover, where the commission of a crime is indicated—a "violation of section 1425 of Title 18 of the United States Code"—the facts may be presented by the district director "to the appropriate

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[8] §340.11 *Investigation and report.* Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.

United States Attorney for possible criminal prosecution;" but "[I]f the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted." The "investigation to be made" must of necessity be administrative in character; and it is noteworthy that additional protection to the naturalized citizen is afforded by the "report" and "recommendation" to the Commissioner, who in turn, but only after he decides, in the exercise of his judgment and discretion in the premises, that a civil action in equity for denaturalization should be brought, will forward the dossier or a summary thereof to the United States "district attorneys," who "upon affidavit showing good cause" are, according to the [fol. 72] provisions of Section 340, to "institute proceedings" in the appropriate state or federal court to effect revocation of the certificate of naturalization. The articulation between the various sections of the Act and the Regulations is compact and in no way ambiguous or repetitious. No effort is wasted on unnecessary commentary; and provision is made for the very sort of administrative orderliness that it is the purpose of the Regulations to serve. Again and again is the administrative investigatory power of the Service recognized, and in the very matter of denaturalization proceedings under Section 340.

Broad policy considerations, plainly to be seen on the face of the Immigration and Nationality Act of 1952, are equally at variance with the narrow interpretation of Section 235(a) which is reflected in the orders appealed from.

Even as early as 1903 the Congress framed immigration laws which took cognizance of subversives (Act of March 3, 1903, c. 1012; 32 Stat. 1213). But in recent years infiltration, by the hirelings and conspiratorial agents of Communism, and by the propagandists and enthusiasts of that and other alien ideologies equally repugnant to our free institutions, has become more and more troublesome and menacing. It must not be forgotten that the Subversive Activities Control Act of 1950 (Act of September 23, 1950, c. 1024, Title 1, §§ 1-32; 64 Stat. 987) amended numerous

sections of various immigration and naturalization laws, and most of these amendments have been incorporated into the 1952 Act with which we are now concerned. The findings relative to totalitarian dictatorship and the world communist movement which are found in Section 2 of the Subversive Activities Control Act of 1950 have a direct bearing on the Congressional intent behind Section 235(a) [fol. 73] of the 1952 Act; and one of the findings is especially significant. Section 2(14) of the 1950 Act states:

> "One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society."

Suffice it to say that there is abundant internal evidence in the Act of 1952, and those laws which have been integrated into its warp and woof, to indicate that the Congress in bringing together for the first time in our history all the laws regulating immigration and naturalization, into one extensive compilation, was particularly sensitive to the need for prompt and effective dealing with subversives. Again and again we find a steady strengthening of the investigatory powers of the Service,[4] and, where experience prior to the passage of the Act of 1952 disclosed the need therefor, holes in previously existing laws were plugged and gaps were filled.[5] This was done so that the facts

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[4] E. g., Secs. 105, 235, 287, 335, 8 U.S.C.A. Secs. 1105, 1225, 1357, 1446.

[5] E. g., Sec. 101, 8 U.S.C.A. Sec. 1101, clarified the definition of "entry" which had given the courts considerable difficulty in previous cases. See *Delgadillo* v. *Carmichael*, 332 U.S. 388 (1947) and *Di Pasquale* v. *Karnuth*, 158 F. 2d 878 (C.A. 2, 1947); Sec. 318, 8 U.S.C.A. Sec. 1429, eliminated the anomolous situation confronting the court in *U.S. ex rel Walther* v. *District Director*, 175 F. 2d 693 (C. A. 2, 1949). See *U.S. ex rel Jankowski* v. *Shaughnessy*, 186 F. 2d 580 (C.A. 2, 1951); Sec. 243(c), 8 U.S.C.A. Sec. 1253(c), specifically corrected the problem confronting the courts under the prior provision in *U.S.* v. *Prince Line Ltd.*, 189 F. 2d 386 (C.A. 2, 1951); Sec. 274, 8 U.S.C.A. Sec. 1324,

might be promptly ascertained and appropriate and expeditious action taken, not only by way of exclusion or deportation, but in the general administration and enforcement of the Act, applicable to the whole subject of immigration and naturalization as set forth therein.

[fol. 74] This does not mean that the Falcones and Oddo are charged with or even suspected of subversion. Nothing in these records now before us indicates that any of the respondents has ever been engaged in or had any knowledge of subversive activities of any kind. Nor are they to be criticized for challenging the authority of the immigration officers to issue the subpoenas. They had a perfect right to do that. Furthermore, in so far as concerns the interpretation of Section 235(a), we may assume that they may well be exonerated at the conclusion of the investigations. But the answer to the question before us does not depend upon what may or may not be revealed in a particular case; and it is plain that the exercise of these increased administrative investigatory powers by immigration officers in ferreting out concealments and frauds connected with naturalization proceedings, will put the government in a position to deal more effectively with subversives.

Accordingly, we conclude that the increased administrative investigatory powers given by the terms of Section 235(a) of the 1952 Act were intended to relate to the enforcement of the Act as a whole, as stated therein, including the ascertainment of such facts as may tend to support a petition for denaturalization. The fact that deportation may follow denaturalization merely emphasizes further the reasonableness of the enlargement of powers of immigration officers which we find in Section 235(a).

We share the solicitude of the two able district judges below, that naturalized citizens be not harassed by subpoenas issued pursuant to legislation of doubtful applicability nor deprived of "the security of judicial over administrative action;" but we think the statute is free from

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cures the omission, from the earlier statute, of penalty provisions for certain of the offenses described therein. The earlier defect was pointed out in *U.S.* v. *Evans*, 333 U.S. 483 (1948).

ambiguity. Nor does it seem to us that the denaturalization [fol. 75] suit, which may in some cases follow the administrative investigation provided for in Section 235(a), will lack any of the safeguards and protections which are commonly associated with judicial proceedings. Respondents will still have their sixty days to answer the petitions, should they be filed, together with the protection afforded by the Federal Rules of Civil Procedure; and they may still urge any constitutional objection to questions addressed to them by the immigration officers in the course of the investigations.

The orders appealed from are reversed; and the respective District Courts directed to proceed in accordance with this opinion.

[fols. 76-77] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of the Application of HAROLD E. BARNES, Officer in Charge of Immigration & Naturalization Service for Process to Enforce Subpoena as to Salvatore Falcone

JUDGMENT—January 10, 1955

Appeal from the United States District Court for the Northern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

[fol. 78] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of the Application of HAROLD E. BARNES, Officer in Charge of Immigration & Naturalization Service for Process to Enforce Subpoena as to Joseph Falcone

JUDGMENT—January 10, 1955

Appeal from the United States District Court for the Northern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

[fol. 79] [File endorsement omitted.]

[fols. 80-88] Petition for Rehearing Covering 9 Pages Filed January 24, 1955 Omitted from this Print. It Was Denied, and Nothing More by Order February 8, 1955.

[fols. 89-90] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted].

ORDER DENYING PETITION FOR REHEARING—February 8, 1955

Before Chase, Medina and Hincks, Circuit Judges.

Anthony S. Falcone, Attorney for Petitioners, Salvatore Falcone and Joseph Falcone.

PER CURIAM:

Petition for rehearing denied.

Harrie B. Chase, Carroll C. Hincks, Harold R. Medina, U. S. Circuit Judges.

[fol. 91] In United States Court of Appeals, Second Circuit

[Title omitted]

Order Denying Petition for Rehearing—February 8, 1955

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) A. Daniel Fusaro, Clerk.

[fol. 92] [File endorsements omitted.]

[fol. 93] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 94] Supreme Court of the United States, October Term, 1954

No. 716

Salvatore Falcone and Joseph Falcone, Petitioners,

vs.

Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service

Order Allowing Certiorari—Filed May 16, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar and assigned for argument immediately following No. 625.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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HAROLD B. WILLEY, Clerk

No. 935

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

ABRAHAM MINKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

ABRAHAM MINKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, reversing the judgment of the United States District Court for the Eastern District of Pennsylvania, which held respondent, a naturalized citizen, in contempt for disobedience of the latter court's prior order directing him to testify in an administrative investigation of his naturalization.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in Appendix A, *infra*, has not yet been reported. The opinion of the District Court (R. 32–36) is reported at 118 F. Supp. 264.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1954, and a petition for rehearing was denied on January 6, 1955. On January 29, 1955, by order of Mr. Justice Burton (Appendix A, *infra*, p. 10a), the time for filing a petition for writ of certiorari was extended to and including March 7. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under the subpoena power conferred by Section 235 (a) of the Immigration and Nationality Act of 1952, an immigration officer, in the course of an administrative investigation to determine whether good cause exists for the institution of denaturalization proceedings, may subpoena the naturalized citizen who is the subject of the inquiry.

STATUTES AND REGULATION INVOLVED

Section 235 (a) of the Immigration and Nationality Act, 66 Stat. 198, 8 U. S. C. 1225 (a), provides in pertinent part:

> * * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United

States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

Section 340 (a) of the Immigration and Nationality Act, 66 Stat. 260, as amended, 68 Stat. 1232, 8 U. S. C. 1451, provides:

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certifi-

cate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *.

8 C. F. R. 340.11 provides:

> Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by willful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.

STATEMENT

In connection with an investigation to determine whether good cause existed for the institution of a proceeding pursuant to Section 340

(a) of the Immigration and Nationality Act of 1952 to cancel respondent's 1945 naturalization, the District Director of the Immigration and Naturalization Service at Philadelphia, Pennsylvania, issued a subpoena under Section 235 (a) of the Act, commanding respondent to appear and testify at the office of the Service in Philadephia. The subpoena was captioned "In re Abraham Minker", and required respondent's presence on September 16, 1953 (R. 4). Before that date, respondent filed a motion in the United States District Court for the Eastern District of Pennsylvania, seeking to have the subpoena quashed on the grounds (1) that it did not disclose the nature of the investigation, (2) that it was unauthorized by statute, and (3) that its provisions were unreasonable and oppressive (R. 30). At the argument on the motion, the Government disclosed that the object of the administrative inquiry was to determine whether respondent's 1945 naturalization was vulnerable, and that the testimony sought from respondent concerned only himself. The motion to quash was denied (R. 37). *In re Minker*, 118 F. Supp. 264.

The District Director thereupon notified respondent to appear on January 5, 1954, in accordance with the terms of the original subpoena (R. 5–6). Upon his failure to comply, the District Court, on application of the District Director, entered an order on March 29, 1954, requiring respondent to appear and testify in the admin-

istrative proceedings (R. 7–8). Respondent's disregard of this order led to the entry by the District Court of an order to show cause why he should not be adjudged in contempt (R. 14). After hearing on the order to show cause, on June 3, 1954, respondent was adjudged in contempt and fined $500 (R. 15–16).[1]

On appeal, the judgment was reversed. The Court of Appeals, although considering the proceeding to be one "concerning [a] matter which is material and relevant to the enforcement of this Act and the administration of the Service" within the purview of Section 235 (a) (App. A, p. 30a), held that the subject of an administrative denaturalization investigation is not a "witness" within the meaning of that section (App. A, pp. 7a–8a).

REASONS FOR GRANTING THE WRIT

Since rendition of the decision below, the Court of Appeals for the Second Circuit has handed down a decision directly in conflict with this one. *Application of Barnes*, decided January 10, 1955, rehearing denied, February 8, 1955, reprinted as Appendix B of this petition, *infra*. The opinion of the Second Circuit discusses at length the question whether an administrative proceeding to determine whether there is good cause for denaturalization is a matter

[1] Not presented, therefore, is the issue tendered in *United States* v. *Vivian*, C. A. 7, January 3, 1955 (not yet reported), as to the appealability of an order to testify before it has culminated in a contempt judgment.

relevant to the enforcement of the Act and the administration of the Service within the purview of Section 235 (a), and assumes that resolution of this issue in the affirmative establishes the right to subpoena the person whose naturalization is in issue. The decision of the court below, on the other hand, summarily reaches the conclusion that the proceeding is one to which the subpoena power conferred by Section 235 (a) pertains, and discusses at length the question of whether the person previously naturalized may properly be considered a witness. The fact remains, however, that the court below has held that the person whose naturalization is in issue may not be subpoenaed under Section 235 (a), while the Second Circuit has held that he may. And the Second Circuit had before it the decision of the court below when it denied rehearing in the *Barnes* case. There is thus a square conflict which should be settled by this Court.[2]

[2] The conflict is expressly reflected in the opinions of the two Courts of Appeals. In the *Barnes* case, referring to the instant case following the decision of the District Court (subsequently reversed by the court below), the Second Circuit observed that it involved the "identical proposition" (App. B, p. 5b). Similarly, the court below described the problem in *Barnes* (referring to the District Court decision thereafter reversed by the Second Circuit) as "indistinguishable" (App. A, p. 6a).

The issues presented by the decision of the court below and the Second Circuit are also pending before the Court of Appeals for the Fifth Circuit in *Lansky* v. *Savoretti*, No. 14982.

We submit that the Second Circuit was correct in holding that the subpoena power conferred by Section 235 (a) extends to the person whose naturalization is in issue. The subpoena power is an effective tool for obtaining information "from those who best can give it and who are most interested in not doing so." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642. In its broad grant of compulsory process for administrative inquiries in Section 235 (a), Congress undoubtedly meant to make that power as broad as the power to investigate. See *In re Wing*, 124 F. Supp. 492 (N. D. Cal.).

The court below drew a distinction between a "witness" and the person whose naturalization is in issue because of the fact that other sections of the 1952 Act, notably Sections 236 (a), 242 (b), 335 (b) and 336 (d), distinguish between the party involved and a witness.[3] These four sections, however, all refer to specific classes of hearings where there is a party (the alien) as

[3] Section 16 of the Immigration Act of 1917, 39 Stat. 885, 8 U. S. C. (1946 ed.) 152, while it conferred subpoena power only with respect to matters "touching the right of any alien to enter, reenter, reside in, or pass through the United States," referred to "the attendance and testimony of witnesses." In *Loufakis* v. *United States*, 81 F. 2d 966 (C. A. 3), the court below held that an alien against whom deportation proceedings were pending—unquestionably a party to those proceedings—could be subpoenaed under the power thus conferred. Similarly, in *Graham* v. *United States*, 99 F. 2d 746 (C. A. 9), though reversing a contempt order for failure to consider a claim of privilege addressed to certain

distinguished from other witnesses. Typical is Section 236 (a), relating to exclusion hearings before special inquiry officers, which provides in part:

> A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses.

This provision, and the other three sections referred to by the court below,[4] deal with an adversary administrative or judicial proceeding brought by or against the alien, who is clearly a party thereto; and each party is authorized to present his own witnesses and cross-examine his adversary's. Section 235 (a), on the other hand, relates to investigations which are preliminary to formal proceedings, and which seek to determine whether there have been violations for which formal enforcement procedures should be instituted. In such inquiries, there are no parties,

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questions, the court plainly agreed that the subpoena power extended to an alien in proceedings for his deportation. While the court in the instant case explicitly stated that it was not passing on situations other than that immediately before it, and therefore not on a situation like that presented in *Loufakis* (App. A, p. 8a), the rationale of the instant case would appear to preclude the result reached in *Loufakis*.

[4] Section 242 (b) relates to expulsion proceedings before special inquiry officers, Section 335 (b) to preliminary administrative examinations on naturalization petitions, and Section 336 (a) to final hearings in open court on naturalization petitions.

but only witnesses. No person becomes a party until a specific proceeding authorized by the Act is started by or against him. Indeed, the investigation may disclose that there is no basis for instituting any formal proceedings. Since there are no parties, as such, at this preliminary phase of inquiry, it is not surprising that Congress found it unnecessary in Section 235 (a) to make the distinction between parties and witnesses found in other sections of the Act where such distinctions have meaning.

The court below found it necessary to construe narrowly the subpoena power conferred by Section 235 (a), lest its employment in administrative denaturalization investigations pre-empt the judicial procedure for revocation set up in Section 340 (a) and undermine the latter's safeguards, a result hardly intended by Congress. However, as the Court of Appeals for the Second Circuit pointed out in the *Burnes case* (App. B, *infra*, pp. 19b–20b), if judicial proceedings for revocation should be instituted after investigation, the defendant would have all the safeguards afforded by Section 340. Even in those proceedings, however, the defendant would have no immunity from making discovery or from being called as a witness, except of course insofar as he should elect to claim his privilege against self-incrimination under the Fifth Amendment. That privilege is available to him in a preliminary investigation as well. There is thus no reason why a person whose

naturalization is in issue should not be questioned during the preliminary investigation before it is determined whether or not there is good cause for revocation of naturalization.

CONCLUSION

In view of the conflict between the decision below and that of the Second Circuit in *Application of Barnes*, and in view of the importance of the question presented, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

FEBRUARY 1955.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 11347

UNITED STATES

v.

ABRAHAM MINKER, APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 14, 1954

Before GOODRICH, KALODNER and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed December 1, 1954)

By HASTIE, *Circuit Judge.*

The contempt conviction which we review on this appeal resulted from the refusal of the appellant, Abraham Minker, a naturalized citizen who had resided in this country for more than forty years, to honor a subpoena issued by the District Director of Immigration and Naturalization requiring appellant to appear and testify as a witness in an administrative proceeding entitled "In re Abraham Minker".

From the beginning it has been agreed that this administrative proceeding was the opening

inquiry in a course of official action directed toward the denaturalization of Minker.[1] If probable cause for denaturalization should be found in this administrative proceeding, the appropriate officer of the Immigration and Naturalization Service would then submit his certificate and affidavit of probable cause to a United States Attorney. In normal course, the United States Attorney, armed with that affidavit and such evidence as the immigration authorities had assembled in reaching the administrative decision, would proceed, as authorized by statute, to institute a formal court action against Minker seeking a decree depriving him of citizenship.

The question before us is whether the immigration officer had authority to subpoena Minker to testify in the administrative first stage of official action toward his denaturalization. The government says that Section 235 (a) of the Immigration and Nationality Act of 1952[2] gives immigration officers such subpoena power. That

[1] After the issuance of the subpoena, a letter was sent appellant advising him that his attendance was commanded in order that he might give testimony "in connection with and relating to the possible institution of proceedings seeking the revocation of your naturalization in accordance with Section 340 of the Immigration and Nationality Act of 1952."

[2] 66 Stat. 198, 8 U. S. C. § 1225 (a). The subsection reads as follows:

"* * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the ad-

section provides that " * * * any immigration officer * * * shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers. * * *" It also makes this power applicable to the obtaining of testimony "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service. * * *" Certainly, the proceeding "In re Minker" was such a matter. The doubtful question is whether Abraham Minker, in his relation to "In re Minker" is a "witness" within the meaning of Section 235 (a).

In our ordinary use and understanding of language, witnesses and parties are different categories of participants in an administrative or judicial inquiry. Yet, those so interested in a proceeding as to be parties do at times give evidence as witnesses. Therefore, it may be unclear on the face of a legislative enactment concerning witnesses whether parties are included. This ambiguity has appeared and has proved troublesome in cases arising under statutes which au-

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ministration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

thorize the taking of depositions of "witnesses". It has frequently been held that parties and other interested persons are not covered by such statutes. *In re Denning,* 1948, 44 Del. 470, 61 A. 2d 657; *Hamilton Co.* v. *Goring,* 1940, 65 R. I. 459, 16 A. 2d 334; *Hubbard* v. *Haynes,* 1949, 189 Tenn. 335, 225 S. W. 2d 252. We cite these cases principally for their teaching that "witness" is likely to be an ambiguous word, the meaning of which "is to be determined in each case by the attendant circumstances and context, and that there is no safe general rule that can be applied universally". See *Hubbard* v. *Haynes, supra,* at 338, 225 S. W. 2d at 253. Approaching this case that way we find three considerations which lead us to the conclusion that "witnesses" as used in Section 235 (a) should not be construed to include such a party as appellant.

In 1952 Congress rewrote the entire body of our statutory immigration and nationality laws. Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C., 1952 ed., ch. 12. The provision we now are construing is new language in the 1952 Act. The section in which it appears is only one of several scattered throughout the Act in which some provision is made concerning witnesses. Therefore, it is significant that in several such sections where Congress wished to make a provision as to witnesses applicable to parties in interest, it said so. In prescribing naturalization procedure, Congress granted the subpoena power in these terms:

> The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for

> naturalization * * * For such purposes any such employee * * * is authorized * * * to require by subpena the attendance and testimony of witnesses, including petitioner, * * * 8 U. S. C., 1952 ed., § 335 (b).

Similar precision appears in the regulation of deportation procedure:

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses * * * 8 U. S. C., 1952 ed., § 242 (b).

Almost identical language appears in connection with the exclusion of aliens:

> A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses. 8 U. S. C., 1952 ed., § 236 (a).

Again, it is provided:

> The Attorney General shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, including the petitioner, * * * 8 U. S. C., 1952 ed., § 336 (d).

In these circumstances the failure to make any equivalent amplification of the witness category

in Section 235 (a) is some indication that none was intended.

The second consideration is predicated on the fact that in Section 340 of the new immigration statute, Congress has been careful to outline a judicial procedure which must be followed to accomplish denaturalization. 8 U. S. C., 1952 ed., § 1451. Specific provision is made for an adversary proceeding to be instituted by a United States Attorney in an appropriate court. Grounds for denaturalization must be stated in a formal charge and this document must be served upon the defendant, who shall have 60 days in which to answer. A trial follows. Congress must have believed that the administration of justice in these serious cases would be facilitated by safeguards inherent in such procedure. But, as one district judge has pointed out in a case indistinguishable from ours, "If the subpenas here were allowed to stand, the judicial procedure for the revocation of naturalization certificates would be pre-empted by administrative action, and the provisions for personal notice, sixty-day time period to answer in section 340 (b) of the Act would be empty words." *Application of Barnes*, N. D. N. Y. 1953, 116 F. Supp. 464, 469. Accord, *In re Odda*, S. D. N. Y. 1953, 117 F. Supp. 323. Of course Congress may have intended to minimize the safeguards afforded by Section 340 by compelling the citizen to be a witness against himself in an administrative pretrial. But we think such intention sufficiently unlikely to make a court reluctant to find it by an unnecessarily broad interpretation of the subpoena power conferred by Section 235 (a).

Finally, we think the character of denaturalization is such that in choosing between reasonable alternative constructions of statutory language, a court should incline toward the construction favorable to the person whose status is put in jeopardy. The strict construction of criminal statutes is an accepted policy of our jurisprudence designed to protect those who live under our law from possible injustice. Technically, we are not administering the criminal law in this case. But we are concerned with the administration of a sanction which in effect is gravely penal. A fine or imprisonment is the normal criminal penalty. But loss of citizenship is a far graver penalty than most fines and many prison sentences. The Supreme Court has recognized this by requiring a strictness of proof in denaturalization cases which approximates that imposed in criminal cases. *Schneiderman* v. *United States*, 1943, 320 U. S. 118; *Baumgartner* v. *United States*, 1944, 322 U. S. 665. And a court of appeals has recently held that the rule of strict construction of penal statutes applies to legislation of "punitive impact" very much like denaturalization. *Mangaoang* v. *Boyd*, 9 Cir. 1953, 205 F. 2d 553. We think this is sound and salutary doctrine. Its application here is the third factor which leads us to the construction urged by appellant.

We conclude that a citizen confronted with an administrative proceeding which poses a challenge to his right to retain citizenship is not to be regarded as a "witness" within the meaning of Section 235 (a) or required under that section to appear and testify against himself. We note that the learned district judge in this case was careful

to say that he was not deciding what the appellant might be required to testify but merely that, in response to the subpoena, he must submit himself as a witness. However, we think the statute does not contemplate that he must be a witness at all in an administrative inquiry instituted with a view to depriving him of citizenship. That much we decide, but no more. We neither consider nor intimate any opinion upon any of the countless other situations in which immigration officers may undertake to require by subpoena the appearance and testimony of interested persons in administrative inquiries. E. g., the problem presented, under a statute now repealed, in *Loufakis* v. *United States*, 3 Cir. 1936, 81 F. 2d 966.

The judgment will be reversed.

United States Court of Appeals for the Third Circuit

No. 11347

UNITED STATES OF AMERICA

v.

ABRAHAM MINKER, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present GOODRICH, KALODNER and HASTIE, *Circuit Judges*

Judgment

This cause came on to be heard on the record from the United States District Court for the East-

ern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

Attest:

IDA O. CRESKOFF,
Clerk.

DECEMBER 1, 1954.
Filed December 1, 1954.

United States Court of Appeals for the Third Circuit

No. 11347

UNITED STATES
v.
ABRAHAM MINKER

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge,* and MARIS, GOODRICH, KALODNER, STALEY and HASTIE, *Circuit Judges*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court:

Wm. H. Hastie,
WILLIAM H. HASTIE,
Circuit Judge.

Dated January 6, 1955.
Filed January 6, 1955.

Supreme Court of the United States

No. —, October Term, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

ABRAHAM MINKER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 7, 1955.

(s) HAROLD H. BURTON,
Associate Justice of the Supreme Court of the United States.

Dated this 29th day of January, 1955.

APPENDIX B

Nos. 20, 21, 76, October Term, 1954

Argued November 5, 1954. Decided January 10, 1955

Docket Nos. 23081, 23082, 23172

APPLICATION OF HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE, FOR PROCESS TO ENFORCE SUBPOENA AS TO SALVATORE FALCONE

APPLICATION OF HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE, FOR PROCESS TO ENFORCE SUBPOENA AS TO JOSEPH FALCONE

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, PETITIONER-APPELLANT

v.

JOHN ODDO, RESPONDENT-APPELLEE

Before CHASE, MEDINA, and HINCKS, *Circuit Judges*

Appeals from orders of Judge Foley, United States District Court for the Northern District of New York, and Judge Weinfeld, United States District Court for the Southern District of New York, holding invalid and unauthorized by law subpoenas, issued by an immigration officer, under

Section 235 (a) of the Immigration and Nationality Act of 1952, for the discovery of evidence to support a suit for denaturalization, as provided in Section 340 of the 1952 Act. Reported below, *Matter of Falcone*, 116 F. Supp. 464; *In re Oddo*, 117 F. Supp. 323. Reversed.

Theodore F. Bowes, United States Attorney for the Northern District of New York, Syracuse, New York (Charles J. Miller, Ass't U. S. Attorney, of Counsel; Herman I. Branse, Acting District Counsel Immigration and Naturalization Service, On the Brief), for applicant-appellant Harold E. Barnes.

Anthony S. Falcone, Utica, New York, for respondents-appellees Salvatore Falcone and Joseph Falcone.

J. Edward Lumbard, United States Attorney for the Southern District of New York, New York City (Harold J. Raby, Assistant United States Attorney and Lester Friedman, Attorney, Immigration and Naturalization Service, of Counsel), for petitioner-appellant Edward J. Shaughnessy.

Kaufman & Edelbaum, New York City (Maurice Edelbaum and Seymour Teitelbaum, New York City, of Counsel) for appellee John Oddo.

MEDINA, *Circuit Judge:*

The sole question raised by these two appeals is whether Section 235 (a) [1] of the Immigration and

[1] "SEC. 235. (a) The inspection, other than the physical and mental examination of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigra-

Nationality Act of 1952 (the McCarran-Walter Act), 66 Stat. 163, 198-9; 8 U. S. C. A. Sec. 1225 (a), authorizes an officer of the Immigration and

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tion officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents, relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a

Naturalization Service to issue a subpoena requiring a naturalized citizen to testify, in an effort to determine if "good cause" exists for the commencement of proceedings to revoke the order admitting such person to citizenship.[2]

In the cases of Salvatore Falcone and Joseph Falcone, the Officer in Charge of the Immigration and Naturalization Service in Syracuse, New York, applied, on notice, to the United States District Court for the Northern District of New

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subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

[2] "SEC. 340. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

York for orders directing the Falcones, upon whom subpoenas had been served, and who challenged the authority of the Officer to issue the subpoenas under Section 235 (a), to appear and testify. In the case of John Oddo the subpoena was issued by the District Director of Immigration and Naturalization for the New York District, Judge Dimock in the Southern District of New York made an ex parte order directing Oddo to appear and testify, and Oddo moved to vacate Judge Dimock's order. In each case it appeared that testimony was sought relative to the possibility of instituting an action in equity pursuant to the terms of Section 340 of the Immigration and Nationality Act of 1952, for a decree of denaturalization, the Falcones having been admitted to citizenship in 1923, and Oddo in 1931. Judge Foley refused to direct the Falcones to appear and testify and Judge Weinfeld granted the motion to vacate, each holding that Section 235 (a) authorized the issuance of subpoenas only in cases involving the entry, exclusion and deportation of aliens. The identical proposition was decided contrawise by Judge Welsh, in the District Court for the Eastern District of Pennsylvania. *In re Minker*, 118 F. Supp. 264 (1953).

An "immigration officer" is defined in Section 101 (a) (18) of the 1952 Act as "any employee or class of employees of the Service or of the United States designated by the Attorney General * * * to perform the functions of an immigration officer specified by this Act or any section thereof;" and Section 101 (b) (4) defines a "special inquiry officer" as any immigration officer "who the Attorney General deems specially

qualified to conduct specified classes of proceedings * * * required * * * to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General * * *." The specified classes of proceedings referred to are exclusions proceedings, Section 235 (b), and deportation proceedings, Section 242 (b). Without pausing to spell out the details, it will suffice to say that the established method of selecting these immigration and special inquiry officers gives assurance that they have had experience in miscellaneous phases of the work of the Immigration and Naturalization Service and possess a special competence and familiarity with the wiles and devices of those seeking in one way or another to defeat the purposes of and to evade the laws governing immigration and naturalization, which are complex and highly technical.

Those who performed analogous functions under the predecessor statute, The Immigration Act of 1917, were described in Section 16 thereof, the Section which as amended became Section 235 (a) of the Act of 1952, as "immigrant inspectors." The heading of this old Section 16 reads: "Physical and Mental Examination of Alien Passengers; Regulations; Authorization of Inspectors to Administer Oaths; Appeal to Medical Boards and Personnel Thereof; Subpena of Witnesses and Documents; Penalty." There were no "Titles" or "Chapters" as in the subsequent 1952 Act.

Section 16 provided that, "[S]aid inspectors (the immigrant inspectors) shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter,

reenter, pass through, or reside in the United States * * *" and that, "[A]ny district director of immigration and naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States, and to that end may invoke the aid of any court of the United States; and any district court within the jurisdiction of which investigations are being conducted by an immigrant inspector may * * * issue an order requiring such person to appear * * * and testify; and any failure to obey such order * * * may be punished * * * as a contempt." There is no dispute about the fact that the provisions just referred to constituted the authority and machinery for administrative investigations by the Service under the 1917 Act, and this authority was widely and continuously exercised.

The Revisers' Notes make it plain that the new Section 235 (a) of the 1952 Act, pursuant to which the Falcone and Oddo subpoenas were issued, is the successor to the old Section 16 of the 1917 Act. The amendments are so specific and clear as practically to determine the issue before us. The "immigrant inspectors" are now "any immigration officer, including special inquiry officers," as defined supra, and they are given by Section 235 (a) power to administer oaths and to take and consider evidence "of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to

enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service * * *." And Section 235 (a) proceeds to use identical language in connection with the power of "any immigration officer, including special inquiry officers" to "require by subpena the attendance and testimony of witnesses * * *. relating to the privilege of any person to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." As in the old Section 16 the appropriate District Courts are to direct such witnesses to appear and testify and to punish a refusal to testify as a contempt; and Section 287 (b) repeats the key phrase above quoted in describing the powers of immigration officers and employees in administering oaths and taking and considering evidence.

Thus certain officers of the Service, designated by the Attorney General, and undisputedly including those who issued the subpoenas in these cases now before us, were explicitly given increased administrative investigatory powers. The counterpart of the phrase appearing in the 1917 Act is strengthened and broadened by the addition of the words "of or from any person," and "or person he believes or suspects to be an alien;" and there is added, both in the part of the section relating to the administration of oaths and the taking and consideration of evidence and in that relating to the subpoena power and its enforcement by the District Courts, as well as in Section

287 (b), the new and comprehensive words "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." Surely investigations of an administrative character, conducted by the very officials who by training and experience have expert knowledge of the whole subject of immigration and naturalization, and designed not merely to procure evidence to support a denaturalization proceeding under Section 340 of the Act, but to ascertain the true facts and in many if not most cases, exonerate those under investigation, are "concerning * * * matter which is material and relevant to the enforcement" of the Act. True, the language is general, there is no specific reference to denaturalization proceedings; but the very generality of the terms of the statute compels the conclusion that the powers thus conferred may be exercised in reference to the enforcement of Section 340 of the Act, as well as that of all the rest. We are not at liberty to disregard language the import of which is so plain, simply because, in the allocation of "Titles," and "Chapters," and Section headings, the language conferring administrative investigatory powers is included in "Chapter 4, Provisions Relating to Entry and Exclusion" of "Title II; Immigration," and as part of a long section headed, "Inspection by Immigrant Officers." The historical relationship between the old Section 16 of the 1917 Act and the new Section 235 (a), as well as the perfectly clear character of the added words above referred to, and their iteration, completely rule out the possibility of inadvertence, confusion or ambiguity. And it

is worthy of note that the Act of 1952 was not hastily thrown together. On the contrary, it is the result of years of patient study by experts thoroughly conversant with the long history of successive Acts affecting immigration and naturalization and allied matters, and having ripe experience with the practical problems with which the Service has had to grapple.

The rule of construction applicable in such cases is well restated in *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, 528–9 (1947):

> Where the text is complicated and prolific, headings and titles can do not more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. *United States* v. *Fisher*, 2 Cranch 358, 386; *Cornell* v. *Coyne*, 192 U. S. 418, 430; *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348, 354. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

It is said that a reading of the 1952 Act as an integrated whole demonstrates that Section 235 (a) was intended to be limited to entry, exclusion and deportation. But our reading of the Act

in its entirety leaves us with a contrary impression. Moreover, if Section 235 (a) is to be applicable only to entry, exclusion and deportation, as held below, what becomes of the words "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service"? Are these significant words to be left hanging in the air, as it were, and given no effect whatever?

Aside from the argument based upon the heading of Section 235 (a) and the inclusion of the administrative subpoena power in Title II of the 1952 Act, relating to Immigration, and that concerning denaturalization proceedings in Title III on Nationality and Naturalization, the principal contentions of respondents stem from the difference in nature between administrative and judicial proceedings and the various provisions of the Act and the Regulations which implement it. Thus it is noted that, pursuant to the terms of Section 340, it is the duty of "the United States district attorneys for the respective districts" to institute "upon affidavit showing good cause therefor" proceedings seeking an order of denaturalization, that such proceedings are judicial in character, that the party thus sued shall have sixty days personal notice in which to answer the petition; and it is said that, if the subpoena power contended for here by the government were sustained, "the judicial procedure for the revocation of naturalization certificates would be pre-empted by administrative action." It seems to be thought that the nature of adversary proceedings of a judicial nature is such that the rights of the United States as petitioner in a

denaturalization proceeding, as to discovery and other procedural matters, should be on a parity with those of the respondent therein, despite the special interest of the Government in matters relating to immigration and naturalization and the undoubted power of the Congress to make provision for investigations by Government officials preliminary to the commencement of action in court. Moreover, it is said that Section 235 (a) and Section 335 (b) of the Act are duplicitous, and that this very alleged duplicity gives rise to an inherent ambiguity.

There is no question whatever about the fact that the investigations sought to be pursued by the issuance of these subpoenas are administrative in character and that a denaturalization proceeding is unqualifiedly judicial. But this presents no inconsistency; nor do we find that Sections 235 (a) and 335 (b) impinge upon one another in any way. Section 235 (a) is purely administrative, as we have already observed. But Section 335 (b) relates to proceedings for naturalization, which have since very early times been held to be judicial in character. The subpoena powers given in Section 335 (b) are incidental to these judicial proceedings, and this is made clear by the language of the section to the effect that, upon a refusal by any person to obey a subpoena, any employee of the Service designated for the purpose by the Attorney General "may invoke the aid of any court exercising naturalization jurisdiction as specified in section 310 of this title; and any such court may in the event of neglect or refusal to respond," require such person to appear and testify, and, upon further failure of

compliance, punish for contempt. Section 310 enumerates the state courts as well as the federal courts in which judicial proceedings for naturalization may be instituted. Thus, the careful integration of the 1952 Act indicates that its several parts are closely articulated into a comprehensive, smoothly functioning whole. After the filing of a petition for naturalization, all examinations and investigations by the officers and employees of the Service designated for that purpose by the Attorney General are conducted pursuant to powers defined and described in Section 335 (b). The statute and the subject matter of immigration and naturalization are sui generis; and the exercise of these administrative and judicial investigatory powers side by side and pari passu is, it seems to us, clearly envisioned by the pattern of the statute.

That administrative investigations may be and are often intended to serve as preliminaries to adversary proceedings of a judicial character to which the United States is a party is more or less of a commonplace, where such investigations will serve the public interest. See, e. g., Internal Revenue Code § 7602 (1954); Atomic Energy Act, 42 U. S. C. A. § 1812 (a) (3); Civil Aeronautics Act, 49 U. S. C. A. §§ 642, 644 (b), 459, 487; Securities Act, 15 U. S. C. A. § 78 (u); Public Utility Holding Company Act, 15 U. S. C. A. § 79 (r). As stated by Mr. Justice Jackson, writing for the Supreme Court in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–3 (1950):

> "The only power that is involved here is the power to get information from those

> who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

In view of the broad general language of Section 235 (a) it does not seem to us surprising that no reference is made in Section 340 to the administrative investigatory powers which the Service now seeks to exercise. Nor do we find anything improperly included in or omitted from the Regulations, now so clearly integrated with the various sections of the Act. There is no point in merely repeating in the Regulations something already apparent on the face of the statute. Naturally, the Regulations affecting "Procedural and Other Non-substantive Provisions" of Section 235 (a) relate to the sort of detailed run-of-the-mill practical problems arising from day to day in connection with immigration inspections.

Moreover, Regulation § 340.11[3] seems to tie in perfectly with the interpretation we have given of Section 235 (a) as conferring new and broad administrative investigatory powers upon immigration officers delegated by the Attorney General to exercise these powers. Thus "whenever it appears that any grant of naturalization may have been procured by concealment or wilful misrepresentation, the facts shall be reported to the district director having jurisdiction * * *." Moreover, where the commission of a crime is indicated—a "violation of section 1425 of Title 18 of the United States Code"—the facts may be presented by the district director "to the appropriate United States Attorney for possible criminal prosecution;" but "[I]f the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation pro-

[3] § 340.11. *Investigation and report.*—Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.

ceedings should be instituted." The "investigation to be made" must of necessity be administrative in character; and it is noteworthy that additional protection to the naturalized citizen is afforded by the "report" and "recommendation" to the Commissioner, who in turn, but only after he decides, in the exercise of his judgment and discretion in the premises, that a civil action in equity for denaturalization should be brought, will forward the dossier or a summary thereof to the United States "district attorneys," who "upon affidavit showing good cause" are, according to the provisions of Section 340, to "institute proceedings" in the appropriate state or federal court to effect revocation of the certificate of naturalization. The articulation between the various sections of the Act and the Regulations is compact and in no way ambiguous or repetitious. No effort is wasted on unnecessary commentary; and provision is made for the very sort of administrative orderliness that it is the purpose of the Regulations to serve. Again and again is the administrative investigatory power of the Service recognized, and in the very matter of denaturalization proceedings under Section 340.

Broad policy considerations, plainly to be seen on the face of the Immigration and Nationality Act of 1952, are equally at variance with the narrow interpretation of Section 235 (a) which is reflected in the orders appealed from.

Even as early as 1903 the Congress framed immigration laws which took cognizance of subversives (Act of March 3, 1903, c. 1012; 32 Stat. 1213). But in recent years infiltration, by the

hirelings and conspiratorial agents of Communism, and by the propagandists and enthusiasts of that and other alien ideologies equally repugnant to our free institutions, has become more and more troublesome and menacing. It must not be forgotten that the Subversive Activities Control Act of 1950 (Act of September 23, 1950, c. 1024, Title 1, §§1–32; 64 Stat. 987) amended numerous sections of various immigration and naturalization laws, and most of these amendments have been incorporated into the 1952 Act with which we are now concerned. The findings relative to totalitarian dictatorship and the world communist movement which are found in Section 2 of the Subversive Activities Control Act of 1950 have a direct bearing on the Congressional intent behind Section 235 (a) of the 1952 Act; and one of the findings is especially significant. Section 2 (14) of the 1950 Act states:

> One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

Suffice it to say that there is abundant internal evidence in the Act of 1952, and those laws which have been integrated into its warp and woof, to indicate that the Congress in bringing together for the first time in our history all the laws regulating immigration and naturalization, into one extensive compilation, was particularly sensitive to the need for prompt and effective dealing with subversives. Again and again we find a steady strengthening of the investigatory powers

of the Service,[4] and, where experience prior to the passage of the Act of 1952 disclosed the need therefor, holes in previously existing laws were plugged and gaps were filled.[5] This was done so that the facts might be promptly ascertained and appropriate and expeditious action taken, not only by way of exclusion or deportation, but in the general administration and enforcement of the Act, applicable to the whole subject of immigration and naturalization as set forth therein.

This does not mean that the Falcones and Oddo are charged with or even suspected of subversion. Nothing in these records now before us indicates that any of the respondents has ever been engaged in or had any knowledge of subversive activities of any kind. Nor are they to be criticized for challenging the authority of the immigration officers to issue the subpoenas. They had a perfect right to do that. Furthermore, in so far as

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[4] E. g., Secs. 105, 235, 287, 335, 8 U. S. C. A. Secs. 1105, 1225, 1357, 1446.

[5] E. g., Sec. 101, 8 U. S. C. A. Sec. 1101, clarified the definition of "entry" which had given the courts considerable difficulty in previous cases. See *Delgadillo* v. *Carmichael*, 332 U. S. 388 (1947) and *Di Pasquale* v. *Karnuth*, 158 F. 2d 878 (C. A. 2, 1947); Sec. 318, 8 U. S. C. A. Sec. 1429, eliminated the anomolous situation confronting the court in *U. S. ex rel Walther* v. *District Director*, 175 F. 2d 693 (C. A. 2, 1949). See *U. S. ex rel Jankowski* v. *Shaughnessy*, 186 F. 2d 580 (C. A. 2, 1951); Sec. 243 (c), 8 U. S. C. A. Sec. 1253 (c), specifically corrected the problem confronting the courts under the prior provision in *U. S.* v. *Prince Line Ltd.*, 189 F. 2d 386 (C. A. 2, 1951); Sec. 274, 8 U. S. C. A. Sec. 1324, cures the omission, from the earlier statute, of penalty provisions for certain of the offenses described therein. The earlier defect was pointed out in *U. S.* v. *Evans*, 333 U. S. 483 (1948).

concerns the interpretation of Section 235 (a), we may assume that they may well be exonerated at the conclusion of the investigations. But the answer to the question before us does not depend upon what may or may not be revealed in a particular case; and it is plain that the exercise of these increased administrative investigatory powers by immigration officers in ferreting out concealments and frauds connected with naturalization proceedings, will put the government in a position to deal more effectively with subversives.

Accordingly, we conclude that the increased administrative investigatory powers given by the terms of Section 235 (a) of the 1952 Act were intended to relate to the enforcement of the Act as a whole, as stated therein, including the ascertainment of such facts as may tend to support a petition for denaturalization. The fact that deportation may follow denaturalization merely emphasizes further the reasonableness of the enlargement of powers of immigration officers which we find in Section 235 (a).

We share the solicitude of the two able district judges below, that naturalized citizens be not harassed by subpoenas issued pursuant to legislation of doubtful applicability nor deprived of "the security of judicial over administrative action;" but we think the statute is free from ambiguity. Nor does it seem to us that the denaturalization suit, which may in some cases follow the administrative investigation provided for in Section 235 (a), will lack any of the safeguards and protections which are commonly associated with judicial proceedings. Respondents will still

ve their sixty days to answer the petitions, ould they be filed, together with the protection orded by the Federal Rules of Civil Procedure; d they may still urge any constitutional objec- ns to questions addressed to them by the immi- ation officers in the course of the investigations. The orders appealed from are reversed; and the pective District Courts directed to proceed in ordance with this opinion.

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No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

ABRAHAM MINKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 16-21) is reported at 217 F. 2d 350. The memorandum opinion of the District Court in the prior proceedings to quash the subpoena, *In re Minker*, is reported at 118 F. Supp. 264.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1954 (R. 21), and a petition for rehearing was denied on January 6, 1955 (R.

22). On January 29, 1955, by order of Mr. Justice Burton (R. 22), the time for filing a petition for a writ of certiorari was extended to March 7, 1955. The petition was filed on February 28, 1955, and was granted on April 11, 1955 (R. 23; 349 U.S. 904). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the subpoena power conferred by Section 235 (a) of the Immigration and Nationality Act of 1952, an immigration officer, in the course of an administrative investigation to determine whether good cause exists for the institution of denaturalization proceedings, may subpoena the naturalized citizen who is the subject of the inquiry.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*, and the applicable regulation of the Immigration and Naturalization Service are set forth as an Appendix, *infra*, pp. 50-60.

STATEMENT

In connection with an investigation to determine whether good cause existed for the institution of a proceeding pursuant to Section 340 (a) of the Immigration and Nationality Act of 1952 to cancel respondent's 1945 naturalization, the District Director of the Immigration and Naturalization Service at Philadelphia, Pennsylvania, issued a subpoena under Section 235(a) of the Act, com-

manding respondent to appear and testify at the office of the Service in Philadelphia. The subpoena was captioned "In re Abraham Minker" and required respondent's presence on September 16, 1953. (R. 3.) Before that date, respondent filed a motion in the United States District Court for the Eastern District of Pennsylvania, seeking to have the subpoena quashed on the grounds (1) that it did not disclose the nature of the investigation, (2) that it was unauthorized by statute, and (3) that its provisions were unreasonable and oppressive (R. 12). At the argument on the motion, the Government disclosed that the object of the administrative inquiry was to determine whether respondent's 1945 naturalization was vulnerable, and that the testimony sought from respondent concerned only himself. The motion to quash was denied (R. 16; *In re Minker*, 118 F. Supp. 264), and respondent did not appeal from that order.

The District Director thereupon notified respondent to appear on January 5, 1954, in accordance with the terms of the original subpoena (R. 4). Upon his failure to comply, the District Court, on application of the District Director, entered an order on March 29, 1954, requiring respondent to appear and testify in the administrative proceedings (R. 5). Respondent's disregard of this order led to the entry by the District Court of an order to show cause why he should not be adjudged in contempt (R. 9). After hearing on the order to show cause, on June 3, 1954, respondent was adjudged in contempt and fined $500 (R. 9-10).

On appeal, the judgment was reversed (R. 21). The Court of Appeals, although considering the proceeding to be one "concerning [a] matter which is material and relevant to the enforcement of this Act and the administration of the Service" within the purview of Section 235 (a) (R. 18), held that the subject of an administrative denaturalization investigation is not a "witness" within the meaning of that section (R. 20-21).

SUMMARY OF ARGUMENT

While it held that a potential party to a denaturalization proceeding is not a "witness" within Section 235(a) of the Immigration and Nationality Act of 1952 (*infra*, pp. 51-53), the court below agreed with the Second and Fifth Circuits that the general subpoena power conferred by that section applies in investigations of possible grounds for denaturalization. However, since the latter holding is disputed, we undertake first to demonstrate that the three courts of appeals are correct on this broad proposition, postponing to our second point the narrower ground on which the court below held respondent in this case immune from subpoena.

I

A. The plain language of Section 235(a)—empowering the Attorney General and any immigration officer to subpoena witnesses for testimony "concerning any matter which is material and relevant to the enforcement of this Act"—authorizes the use of a subpoena in the investigation of

grounds for denaturalization. The Act, to the whole of which Section 235(a) applies, combines for the first time in a single statute the formerly separate subjects of immigration, nationality, and naturalization. Since the Act includes provisions for denaturalization (Section 340(a)), and since the Attorney General is responsible for enforcement of this as well as the rest of the Act (Section 103(a)), an investigation in this area is a "matter" covered by Section 235(a). The point may be demonstrated by comparing this section with the provision from which it derived, Section 16 of the Immigration Act of 1917 (39 Stat. 885, 8 U. S. C., 1946 ed., 152). The latter provision granted the subpoena power merely to district directors and inspectors in charge, and only with respect to matters "touching the right of any alien to enter, reenter, reside in, or pass through the United States * * *." Section 235(a), repeating the foregoing language, then adds the general subpoena power "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service," and confers the power upon the Attorney General, whose enforcement duties cover the whole range of the Act. This deliberate addition argues powerfully for the usual assumption that Congress meant what it said and that Section 235(a) applies to all investigations, like the one in this case, concerned with enforcement of the Act.

B. The legislative history buttresses this con-

clusion. The general language of Section 235(a) was added on the recommendation of the Immigration and Naturalization Service, which worked closely with the responsible committees during the long consideration and study preceding enactment of the statute. It was made perfectly clear that the change was designed to authorize subpoenas for citizens as well as aliens and to require testimony concerning "any matter which is material and relevant to the administration of this Act and of the Service". There can be no such showing of inadvertence as could remotely suggest that the language should be applied to less than all the investigative functions it plainly covers. And investigations of possible cases of "good cause" for proceedings to revoke naturalization constitute a familiar and long-recognized function of the Immigration Service, both before and since its placement under the Attorney General. In its passage of the 1952 Act Congress broadened this area of responsibility and expressed its purpose to increase the duties of administrative investigation in enforcement of the naturalization provisions. The unambiguous language of Section 235(a), read in this setting, unquestionably authorizes the use of subpoenas for inquiry into possible grounds for revoking naturalization.

II

The court below erred in holding that, although the subpoena power under Section 235(a) applies to investigations to determine the validity of

naturalization decrees, it may not be employed to subpoena a person whose status is in question. Such a person is plainly within the category of "witnesses" under Section 235(a), and there is no ground in the statute, in precedent, or in policy for the exception the court announced.

A. Failing to distinguish between administrative investigations and administrative or judicial hearings, the court below found the term "witnesses" insufficient to include a person who might, following an investigation, become a "party." But there are in fact no "parties" to the administrative investigation. There is no litigated issue and no adjudication or "decision" of any kind. All who are called to testify are fully and accurately described as "witnesses." Other sections of the Act, which refer separately to "witnesses" and "petitioners" or "aliens", are concerned with specific proceedings where there are specific "parties" to a hearing or examination. In the *general* grant of investigative power in Section 235(a), it was neither necessary nor appropriate nor readily feasible to attempt some general description of all persons who might be potential "parties," as distinguished from other "witnesses." The latter term aptly covers the field.

B. The language of Section 235(a), granting the subpoena power for administrative investigations by referring generally to "witnesses," follows the pattern of many statutes beginning with Section 12 of the Interstate Commerce Act of 1887, 26 Stat. 743. These cognate provisions have not been

deemed inapplicable to persons who might, following the investigation, become "parties" to some resulting hearing, whether administrative or judicial. On the contrary, the cases defining the scope of the subpoena power characteristically involve such persons or corporations and proceed on the solidly justified premise that these "witnesses" are reached by this statutory term. *E. g., Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186; *Durkin* v. *Fisher*, 204 F. 2d 930 (C. A. 7). As in other administrative inquiries and in grand-jury investigations, the power to issue a subpoena is not dependent on whether the person whose testimony is sought may ultimately be claimed to have violated the law. If he has or may have evidence pertinent to the investigation, he is a "witness" and can be compelled to appear before agency investigators.

C. There are other infirmities in the reasoning of the court below. While it excludes from the term "witnesses" a person who is under investigation for possible naturalization frauds, it fails to explain its previous holding that the same term under the narrower Section 16 of the Immigration Act of 1917 included an alien who was not only being investigated but was the subject of a deportation proceeding. *Loufakis* v. *United States*, 81 F. 2d 966 (C. A. 3). The court invokes the canon of strict construction applicable to criminal statutes though there is no ambiguity here justifying decision on this basis and though the power conferred by Section 235(a) is investigative, not punitive or penal. Finally, extending the confusion of judicial

with investigative power, the court erroneously reasons that the power of inquiry under Section 235(a) will preempt the judicial denaturalization proceeding if a subpoena may require attendance of the potential "party" to such a proceeding. Actually, however, it is commonly required that administrative subpoenas be obeyed by persons against whom criminal as well as civil actions may result from evidence adduced by the inquiry. In an appropriate case, there may be bases for claims of privilege or for other objections to supplying the evidence sought. But there is no problem of this kind here, where respondent failed to present himself, and urge any such objections. *Brown* v. *United States*, 276 U. S. 134, 144. The dispositive point here is that all "witnesses" are subject to subpoena for investigations under Section 235(a), and respondent is within this class.

ARGUMENT

The opinion below recognizes (R. 18) that the Immigration and Nationality Act of 1952 vests power in designated officers of the Immigration and Naturalization Service to investigate persons who are suspected of having procured their certificates of naturalization through the concealment of a material fact or by willful misrepresentation, for the purpose of determing whether "good cause" exists to initiat revocation proceedings under Section 340(a) of that Act. (*infra*, pp. 56-57). The opinion also recognizes the power of such officers to issue an administrative subpoena

under Section 235(a) of the Act (*infra*, pp. 51-53) in connection with such investigation. To this extent the court below is in agreement with the Court of Appeals for the Second Circuit in *Application of Barnes*, 219 F. 2d 137, now pending on writ of certiorari *sub nom. Falcone* v. *Barnes*, No. 47 this Term, and the Court of Appeals for the Fifth Circuit in *Lansky, et al.* v. *Savoretti*, 220 F. 2d 906, pending on petition for certiorari, No. 100 this Term. The actual point of difference between the *Falcone* and *Lansky* opinions on the one hand, and the opinion below on the other, is the narrow holding in this case that the "witnesses" whom immigration officers may subpoena for the preliminary investigations provided for by Section 235(a) of the Act do not include the naturalized citizen who may, if "good cause" is found, become a "party" in some future revocation proceeding.

Since, however, the petitioner in the related case of *Falcone* v. *Barnes*, No. 47, is arguing that Section 235(a) of the Act is altogether inapplicable to investigations which may lead to denaturalization proceedings and is not a source of power to subpoena *any* "witnesses" to testify in an investigation of possible naturalization frauds, we first undertake the refutation of this broad contention. Then we consider the narrower issue whether, given the power to conduct such administrative investigations, the immigration officers designated by the Attorney General can subpoena persons who may later be parties to revocation proceedings.

I

The Subpoena Power Conferred by Section 235(a) of the Immigration and Nationality Act on the Attorney General and Immigration Officers Extends to Investigation of Possible Grounds for Denaturalization

A. The plain statutory language sustains this conclusion

Section 235(a) of the Immigration and Nationality Act of 1952 provides in pertinent part:

> The Attorney General and any immigration officer * * * shall have power to require by subpena the attendance and testimony of witnesses before immigration officers * * * *concerning any matter which is material and relevant to the enforcement of this Act* and the administration of the Service * * *. [Emphasis added.]

"Certainly," the Court of Appeals recognized (R. 18), the investigation in this case is a "matter" to which the subpoena power thus granted extends. And on this point of agreement with the two other courts of appeals which have considered the problem, we think the court below was plainly correct.

The Immigration and Nationality Act for the first time combines in a single statute the subjects of immigration, nationality, and naturalization, which had theretofore been covered by separate statutes, amended at differing times. The Act eliminated a complicated superstructure of amendments, substitutes, repeals, and repetitive material,

and established a self-contained body of law covering, almost completely, the entire subject matter.[1] Where the statutory language makes reference to the context of the entire statute it uniformly refers to "this Act". *E.g.*, Secs. 101(a)(18); 101(e) and (f); 103(a); 104(a); 105; 215(g); 236(c); 241(a)(2); 246(b); 290(a); 313(b).[2] Where a qualification or cross-reference is meant to apply only to a particular title, chapter, section, subsection, or paragraph, or a lesser included part of the entire Act, the statutory language so states: *E.g.*, Secs. 222(e); 223(e); 233(d); 236(a); 284; 329(d). Thus, while some provisions of the Act refer only to the particular subject headings under which they appear, the provisions referring to "this Act" cut across and are made applicable to the entire field covered by the Act. Section 235(a) is such a provision.

Since "this Act", to the whole of which the subpoena power in Section 235(a) applies, includes provisions for the cancellation of naturalization certificates obtained by concealment of a material fact or by willful misrepresentation (Section 340(a), *infra*, pp. 56-57),[3] it necessarily follows

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[1] See United States Code, Congressional and Administrative News, 1952, 82nd Cong., 2d Sess., "Immigration and Nationality Act", pp. 2777-2778.

[2] The enacting provision of the Act provides "That this Act, divided into titles, chapters, and sections according to the following table of contents, may be cited as the 'Immigration and Nationality Act.'"

[3] Section 340(a) has been implemented by regulation as follows (8 C.F.R. 340.11):

> Whenever it appears that any grant of naturalization may have been procured by concealment of a material

that an inquiry as to the existence of such concealment or misrepresentation concerns a "matter which is material and relevant to the enforcement of this Act * * *." Conforming to the broad subject matter of the power, the grant is made, not merely to subordinate or specialized officers, but to the "Attorney General and any immigration officer * * *." The Attorney General is "charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens," and he may delegate to officers or employees of the Immigration Service or Department of Justice "any of the duties and powers imposed upon him in this Act * * *." Section 103(a), *infra*, pp. 50-51. And the "immigration officer" upon whom the subpoena power is specifically conferred by Section 235(a) is defined in Section 101(a) (18) of the Act as follows:

> The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the At-

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fact or by willful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings shall be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.

torney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof.[4]

Thus, the subpoena power relates to the whole range of matters connected with enforcement of the Act and is appropriately confided in the officers whose responsibilities cover this range. On the specific matter of denaturalization, Section 340 (a) requires that, "upon affidavit showing good cause therefor," proceedings to revoke naturalization shall be brought by the United States attorney in the appropriate district. There is, of course, no doubt, even apart from the Attorney General's paramount authority and responsibilty under Section 103(a) of the Immigration Act itself, that denaturalization proceedings, like all activities of the United States attorneys, are conducted under the Attorney General's supervision (28 U.S.C. 507 (b)), and that such cases, like all others "which United States attorneys

[4] By regulation (8 C.F.R. 1.1) the term "immigration officer" is further described as follows:

(9) The term "immigration officer" means—

(i) Any officer or employee of the Service who, on December 24, 1952, was serving under appointment theretofore made to the position of immigrant inspector, patrol inspector, investigator, naturalization examiner, or any other officer of the Service of a higher grade, whose appointment has not terminated, or who hereafter is appointed to such position; and

(ii) Any person designated by the Commissioner to perform the duties and exercise the powers of an immigration officer as set forth in the Immigration and Nationality Act.

may be by law authorized to conduct," may be conducted by the Attorney General or his delegate (5 U.S.C. 310). The conclusion is inescapable that the Attorney General or an officer he designates is authorized and required to enforce the provisions for denaturalization and to determine in any case whether there is "good cause therefor * * *." And this is merely another way of stating the point that the investigation involved here concerns a matter to which the subpoena power in Section 235(a) extends.

Because Section 235(a) is labelled "Inspection by Immigration Officers" and occurs in a chapter headed "Provisions Relating to Entry and Exclusion" under the title "Immigration," it has been suggested that the subpoena power should be read as limited to investigations concerning the entry and exclusion of aliens. See *Application of Barnes*, 116 F. Supp. 464, 467 (N.D.N.Y.) and *In re Oddo*, 117 F. Supp. 323, 324 (S.D.N.Y.), both reversed in *Application of Barnes*, 219 F. 2d 137 (C.A. 2), pending on certiorari *sub nom. Falcone v. Barnes*, No. 47 this Term. But there are several points, detailed by the Second Circuit in the foregoing decision, which decisively answer this suggestion. In the first place, it is a salutary rule, recognizing the realities of legislative draftmanship, that captions and headings, while they may serve as guides in resolving ambiguities, "cannot limit the plain meaning of the text." *Brotherhood of Railroad Trainmen v. B. & O. R. R. Co.*, 331 U.S. 519, 528-529. The suggestion considered here

would most drastically "limit" the text of Section 235(a) by simply excising words which were deliberately added to supply the breadth on which three courts of appeals have agreed. For the Section, after granting the subpoena power for matters "relating to the privilege of any person to enter, reenter, reside in, or pass through the United States", adds that the power may also be employed for inquiries "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, * * *." The first of these quoted clauses would obviously have been sufficient had the power been intended to relate only to the entry and exclusion of aliens. Even apart from the legislative history discussed below (pp. 17-21), showing the purposeful addition of the second clause, this added language could not fairly be stripped of meaning without an impossible showing that its presence in the Act was attributable to legislative inattentiveness or carelessness.

The point is vividly demonstrated by comparing Section 235(a) with the provision from which it was derived and which it superseded, Section 16 of the Immigration Act of 1917 (39 Stat. 885, 8 U. S. C., 1946 ed., 152). That section provided for the issuance of subpoenas by district directors and inspectors in charge simply for matters "touching the right of any alien to enter, reenter, reside in, or pass through the United States * * *." It was in terms limited to inquiries concerning immigration and deportation. Suiting

this limitation, it conferred the power upon officers concerned with these matters. So the deliberate changes effected by the new Act—the all-inclusive language upon which we rely and the grant of the subpoena power to the Attorney General, whose responsibilities are coextensive with the Act—would have to be viewed as pointless to sustain an argument that Section 235(a) applies only to matters involving entry, exclusion, and deportation of aliens. There is no ground for such a view.

In short, we submit that, even on the basis of textual analysis alone, the court below, the Second Circuit, and the Fifth Circuit were clearly correct in holding that Section 235(a) grants the subpoena power for investigation of possible grounds for denaturalization.

B. *The legislative history and administrative background further support the construction required by the terms of the statute*

Legislative history buttresses the usual and proper assumption that Congress meant what it said—that the investigative subpoena power under Section 235 (a) applies to all matters connected with enforcement of the Act. Two detailed analyses of the legislation were prepared for the responsible committees of Congress by the Immigration and Naturalization Service while the measure was in its formative stage.[5] Since the Service

[5] On July 26, 1947, the Senate passed Senate Resolution 137 (80th Cong., 1st sess.), which directed the Senate Committee on the Judiciary to make a full and complete investigation of the entire immigration system. This study was completed

suggestions affecting the present subject were for the most part adopted almost verbatim by Congress, they are persuasive aids to construction. In the document entitled "Original of Analysis on S. 3455, a Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, and For Other Purposes",[9] there appears the following discussion of Section 235 (a) (pp. 235-4 and 235-5):

> The second objective which the Service would like to see accomplished in connection with this subsection [Section 235 (a)] is to provide specific authority to administer oaths and to question not only aliens who seek to en-

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and a comprehensive report of the Committee's findings was published almost three years later, on April 20, 1950, as Senate Report 1515 (81st Cong., 2d sess.). There followed the series of bills leading ultimately to the Act of 1952. On April 20, 1950, Senator McCarran introduced S. 3455 (81st Cong., 2d sess.), which was referred to committee. Following further study, Senator McCarran introduced a revised bill (S. 716, 82d Cong., 1st sess.) incorporating various changes suggested by the Immigration and Naturalization Service. A companion bill (H.R. 2379, 82d Cong., 1st sess.) was introduced in the House of Representatives on February 5, 1951. Further versions of the Bill were introduced in the Senate on August 27, 1951, as S. 2055 (82d Cong., 1st sess.) and in the House on October 9, 1951, as H.R. 5678 (82d Cong., 1st sess.). On January 29, 1952, Senator McCarran introduced S. 2550 in the second session of the 82d Congress. The final draft, which was enacted, was designated H.R. 5678.

[9] This volume and a similar analysis of S. 716 were lodged by the Department of Justice with the Librarian of the Supreme Court for use in *Shomberg* v. *United States*, 348 U.S. 540, and *United States* v. *Menasche*, 348 U.S. 528. See 348 U.S., at 534. These documents were adverted to in the legislative reports. See, *e.g.*, H. Rep. No. 1365, 82d Cong., 2d sess., p. 28; S. Rep. No. 1137, 82d Cong., 2d sess., p. 3.

ter the United States, but also nationals of the United States, and to compel testimony by subpoena in such cases. It is believed that it is the intent of this section to accomplish that purpose, but the Service believes that certain amendments of language are necessary in order that there may be no doubt concerning the authority of Service officers in these respects. We also wish to see the power to administer oaths and to take and consider evidence extended to any matter which is material and relevant to the administration of this Act and of the Service. We have in mind in that regard the fact that under administrative regulation contained in 8 C.F.R. Part 95 there are provisions for disciplinary action against attorneys and other persons authorized to practice before the Service and the Board of Immigration Appeals. There is doubt whether under existing law any officer of the Service has the authority to administer oaths and take evidence or compel testimony in such cases.

To attain the foregoing objectives and clarify in other respects the application of subsection (a) it is recommended that the following amendments be made:

* * * * *

On line 2, page 78, delete the words "Such officers" and insert in lieu thereof the language "The Commissioner and any immigration officer including special inquiry officers.".

On Line 4, page 78, change the word "alien" to "person".

* * * * *

On line 19, page 78, change the word "alien" to "person".

On line 20, page 78, following "United States," insert "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service,".[7]

In the document entitled "Initial Draft of Report on S. 716, Chapters 4, 5, 6 and 7 of Title II", prepared by the Service for use of the two congressional committees at the time the bill which became the final Act was being considered, it was stated (pp. 235-3 and 235-4):

It is to be noted that section 235(a) specifically provides that not only immigration and

[7] The omnibus bill, originally introduced on April 20, 1950, as S. 3455 (81st Cong., 2d sess.), would have limited the investigative subpoena power to matters "touching the privilege of any alien to enter, reenter, reside in, or pass through the United States." Following the submission of the above analysis, S. 716 (82d Cong., 1st sess.) was introduced on January 29, 1951, incorporating in principal part the changes recommended by the Service. Where the word "alien" appeared in certain places in the original bill, the word was changed to "person". The subpoena power was made applicable to the administration of the Act and the Service generally. In one respect, the Senate framers made Section 235 (a) even broader than the Service recommendation. The new bill granted the subpoena power to "the Attorney General and any immigration officer, including special inquiry officers," rather than to "the Commissioner and any immigration officer including special inquiry officers."

special inquiry officers but also the Attorney General shall have the power to administer oaths, to take evidence, and to issue subpoenas. By vesting such powers in the Attorney General, this will make certain that the Attorney General will be in a position to delegate such power to any employee of the Service, as provided in section 103.

* * * * *

In addition, this subsection contains a provision permitting inquiry under oath and by subpoena concerning any matter relevant to the enforcement of this Act and the administration of the Service. These provisions will be of great value in connection with such matters, as, for example, investigation of applications for admission to practice as attorneys or representatives before the Service and the Board of Immigration and Appeals.

While denaturalization proceedings were not specifically referred to, the recommendations of the Service, on which Congress acted, demonstrate that the subpoena power was designedly broadened to include general investigative functions committed to the Attorney General beyond those relating to the entry and exclusion of aliens. And there can be no question that these functions include inquiries of the kind involved here.

In denaturalization matters, the Immigration and Naturalization Service has historically been, and has been known by Congress to be, the investi-

gative arm of the Attorney General, assigned to determine whether there exists the "good cause" which requires that an action for revocation be brought. The history of this relationship between the Service as investigating agency and the United States attorneys as prosecutors goes back to 1906. Although the courts exercised their equitable powers to revoke naturalization decrees for fraud before there was any specific statutory authority for them to do so,[8] Congress first dealt with the denaturalization process in Section 15 of the Act of June 29, 1906, 34 Stat. 601, which imposed "the duty" on United States district attorneys, "upon affidavit showing good cause therefor," to institute denaturalization proceedings. This Act, by requiring the filing of naturalization records in a central file in the Bureau of Immigration and Naturalization, also for the first time made denaturalization proceedings administratively feasible since naturalization records had theretofore been kept only sporadically by the courts.[9] In fact, the 1906 Act was passed in response to complaints of widespread naturalization frauds which were not being systematically or uniformly detected. See *Knauer v. United States*, 328 U.S. 654, 672, fn. 11.

Following passage of the 1906 Act the Bureau

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[8] See Cable, *Loss of Citizenship* (1943), pp. 3-4; Roche, *Pre-Statutory Denaturalization*, 35 Corn. L. Q. 120.

[9] See Cable, *supra*, note 8, pp. 3-4; Roche, *supra*, note 8, p. 137.

of Immigration and Naturalization [10] undertook, not only to administer the naturalization laws up to the point of the judicial hearing, but also to detect and investigate possible illegality and fraudulent procurement of naturalization decrees after rendition. Where denaturalization was sought on the ground of illegality or fraud, it was the Bureau which usually executed the affidavit of "good cause",[11] which was forwarded to the responsible United States Attorney for use in connection with possible judicial proceedings. Section 1565.6(b), *The Nationality Manual*, Govt. Printing Office (1944); Cable, *Loss of Citizenship* (1943), p. 19.[12]

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[10] In 1913, this bureau was transferred to the Department of Labor and split into two separate bureaus, one to administer the immigration laws and the other to administer the nationality laws. In 1933, the two bureaus were again consolidated into the Immigration and Naturalization Service, which in 1940 was transferred to the Department of Justice. See S. Rep. No. 1515, 82d Cong., 2d sess., pp. 290-291.

[11] Where cancellation was based on fraud evidenced by the resumption of residence in a foreign country after rendition of the naturalization decree, Section 15 of the 1906 Act, 34 Stat. 601, contemplated that the American diplomatic or consular officers in the foreign country involved would make the initial administrative investigation looking toward the possibility of future denaturalization, and that such information would be forwarded through State Department channels to the Department of Justice. Cf. *United States* v. *Luria*, 184 Fed. 643 (S.D. N.Y.), affirmed, 231 U.S. 9. Such correlative investigative jurisdiction between the State Department and the Immigration and Naturalization Service has been carried forward into Section 349(d) of the Act of 1952, 66 Stat. 261.

[12] Between 1918 and 1940, the Commissioner of Immigration was given concurrent authority with the United States Attorney to institute the judicial revocation proceedings, S. Rep. No. 388, 65th Cong., 2d sess., p. 3. When the Service

The Bureau maintained the naturalization records in its central files and had constant access to intelligence through which such frauds could be discovered.

By the period of the 1930's the investigative tasks of the Immigration Service had increased to such proportions that it was necessary to establish a Special Investigative Unit in the Department of Labor to detect nationality frauds and provide a factual basis for the institution of cancellation proceedings.[13] A further increased investigative load was created in 1940 when the basic nationality laws were revised and codified and the functions of the Immigration and Naturalization Service were transferred to the Department of Justice. The Service continued to initiate denaturalization proceedings when, on investigation, its officers detected fraud or illegality in the procurement of citizenship.[14]

The next pertinent change in the nationality law was the promulgation of Section 25 of Title I of the Internal Security Act of 1950 (64 Stat. 1013, 1014), which amended the 1940 Nationality Act to provide that membership in a subversive organization within five years after naturalization would be pre-

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was brought under the Department of Justice, this litigating function of the Service was terminated.

[13] See Annual Report of the Secretary of Labor for the Fiscal Year Ending June 30, 1936, p. 94; Annual Report of the Secretary of Labor for the Fiscal Year Ending June 30, 1939, pp. 103-104; Cable, *Loss of Citizenship* (1943), p. 19.

[14] Annual Report of the United States Immigration and Naturalization Service, 1946-47, p. 23.

sumptive evidence of ineligibility at the time of the decree.[15] This security program necessitated post-naturalization investigations by the Service on an extensive scale. During the fiscal year ending June 30, 1952, for example, there were 1,824 investigations made to determine whether evidence existed to support cancellation proceedings. Annual Report of the Immigration and Naturalization Service for Fiscal Year Ending June 30, 1952 (p. 56). See also Annual Report of the Immigration and Naturalization Service for Fiscal Year Ending June 30, 1951, pp. 43-44.

Congress broadened the area of administrative investigation in considerable degree in the 1952

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[15] This Amendment provided in pertinent part as follows:

"(d) If a person who shall have been naturalized after January 1, 1951, shall within five years next following such naturalization—

"(1) become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of this section; or

"(2) become a member of any organization, membership in which at the time of naturalization would have raised the presumption that such person was not attached to the principles of the Constitution of the United States and not well disposed to the good order and happiness of the United States, under the provisions of this section

it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by fraud or illegal procurement."

A. For the purpose of investigation, any person having knowledge of relevant facts is a "witness".

In our view, the critical error of the court below lies in its failure to distinguish between administrative *investigations*, like the ones for which the subpoena power is provided in Section 235(a), and administrative or judicial *hearings*, where "parties" are involved and the objective is a litigated decision of some sort. In describing the investigation involved here, the court below employs terms appropriate in describing a formal hearing (*e.g.*, "such a party as appellant", "administrative pretrial", "administrative inquiry instituted with a view to depriving him of citizenship", etc.), but plainly unsuited to the kind of preliminary inquiry actually in question. Although the opinion lays stress on the caption of the subpoena, "In re Abraham Miniker", that identifying label does not transform the investigation into a hearing; it merely identifies this investigation and distinguishes it from others. What the investigation seeks is facts which may or may not be the basis for future action. It involves no parties or controverted issues of fact. In itself, it results in no adjudication or "decision" of any kind.

It may be helpful in this connection to outline briefly the nature and purpose of the investigative process involved in this case: The Investigative Section of the Central Office of the Service supervises and directs the investigative work of the 16

Act both as to naturalization and denaturalization.[16] The basis for revocation was changed from fraud or illegality to proof that naturalization had been procured "by concealment of a material fact or by willful misrepresentation." Section 340(a), *infra*, p. 56.[17] Membership in certain subversive organizations within five years after naturalization was made prima facie evidence of concealment of a material fact or willful misrepresentation. Section 340(c), *infra*, pp. 57-58. The congressional intent to deprive or divest subsersives and criminals of citizenship fraudulently obtained is manifest throughout the congressional reports.

And Congress provided for administrative powers and duties sufficient to cope with the problem. Thus, when Congress found that only about 5% of the petitions for naturalization were being investigated by the Service (the other 95% being supported by the testimony of witnesses at the preliminary hearing)[18] it provided in Section 335(a)

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[16] See S. Rep. No. 1137, 82d Cong., 2d sess., p. 3:

"In addition to making numerous technical and minor changes in our immigration and naturalization laws, the instant bill makes several significant changes. Among these are the following:

. . . . . .

"(6) Naturalization and denaturalization procedures are strengthened to weed out subversives and other undesirables from citizenship."

[17] Congress evidently made this change because of a confusion in many cases as to what constituted fraud, and because of the difficulty of proof under the prior standard. See S. Rep. No. 1515, 81st Cong., 2d sess., p. 769.

[18] See S. Rep. No. 1515, 81st Cong., 2nd sess., p. 739.

and (b) of the 1952 Act for a neighborhood investigation of the applicant for citizenship in every case unless waived by the Attorney General, and gave designated officers of the Service power "to require by subpena the attendance and testimony of witnesses, including petitioner * * *." It would have been incongruous, while broadening the general investigative power of the Service in the field of naturalization, to make no comparable provision for administrative investigation and detection of naturalization frauds at a time when the area of, and necessity for, post-naturalization investigation was being so sharply increased beyond prior legislation. Section 235 (a), in its general grant of subpoena power for inquiries related to enforcement of the Act, rounds out and fulfills the purpose of Congress.

Cognizant of the requirement that the evidence to justify denaturalization be "clear, unequivocal, and convincing" (*Schneiderman* v. *United States*, 320 U. S. 118, 125; see S. Rep. No. 1515, 81st Cong., 2d sess., p. 762), and seeking broader and more vigorous enforcement of its rules to revoke naturalization decrees unlawfully procured, Congress was informed that the vesting of subpoena power in the Attorney General would "make certain that the Attorney General will be in a position to delegate such power to any employee of the Service" and that Section 235(a) would permit "inquiry under oath and by subpoena concerning any matter relevant to the enforcement of this Act and the ad-

administration of the Service (see *supra*, pp. 18-21). A special provision relating solely to post-naturalization investigations would have been superfluous. It seems clear that Congress intended that the subpoena power conferred by Section 235(a) would extend to all administrative investigations conducted by the Attorney General and the Service under him, including the well-known function of investigating whether good cause existed for recommending institution of a suit for cancellation of citizenship.[19]

We recognize, of course, that the power to issue investigative subpoenas is not lightly to be inferred from inexplicit language of general import. Cf. *Fleming* v. *Mohawk Co.*, 331 U. S. 111; *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363-364. But here we have the power drawn in explicit terms to correspond in a functional way with the increased investigative duties of the Attorney General and the Immigration and Naturalization Service. There is therefore every indication that the literal terms of Section 235 (a) were designed to be followed. The 1952 Act was the product of three years of Congressional consideration, and followed

[19] There are, of course, other administrative investigations which the Service is obligated to make to carry out its functions under the 1952 Act which are not covered by any specific provision of the Act. Some of these include anti-smuggling and stowaway operations, visa and passport fraud operations, and general investigation of criminal activity having possible bearing on the Act. See the chapters entitled "Investigation" in the Annual Report of the Attorney General for 1952, at pp. 464-469, and the Annual Report of the Attorney General for 1953, at pp. 490-493.

"a most intensive and searching investigation and study of our entire immigration and naturalization system." H. Rep. No. 1365, 82d Cong., 2d sess., p. 27; see also S. Rep. No. 1137, 83d Cong., 2d sess., p. 2; S. Rep. No. 1515, 81st Cong., 2d sess. Aside from the analyses of proposed changes submitted to the committees of both houses of Congress by the Immigration and Naturalization Service (see *supra*, pp. 18-21), technical experts of the Service worked in liaison with those committees (H. Rep. No. 1365, *supra*, pp. 27-28; S. Rep. No. 1137, *supra*, pp. 2-3). This cooperation between the administrators and Congress is reflected not only in the substantive changes in the Act, but in the reorganization and consolidation of the functions of the Service and the revamping of procedures to meet the needs of the new legislation.

In view of this background, there can be no reason to narrow the plain language of Section 235 (a). The "enforcement of this Act" not only includes denaturalization investigations as a matter of semantics, but was obviously intended to include this area of special Congressional concern. It is clear—as the three courts of appeals which have had the problem all agree—that the subpoena power, granted generally in aid of such enforcement, is available for investigations of this type.

II

The Administrative Subpoena Provided For in Section 235(a) May Issue Against Any Witness in a Naturalization Fraud Investigation Regardless of the Possibility That He May, If Good Cause Be Found, Be a Party to a Judicial Revocation Proceeding in the Future

Recognizing the general subpoena power of the Service in denaturalization matters, the opinion below holds that the term "witnesses" in Section 235(a) includes only third persons having no direct interest in the outcome of the investigation, and excludes persons in the position of the respondent Minker, who, should good cause be shown therefor, might be the subject of a future judicial revocation proceeding. It reaches this conclusion by equating an interested witness in an investigation with a "party" in a judicial proceeding, or in an adversary administrative "hearing" where adjudicative action results, and by reading "witness" to exclude such a "party."

We submit that this construction is erroneous. We shall undertake to show that the investigative subpoena power under Section 235(a) reaches all persons whose testimony might be material and relevant to an authorized investigation, regardless of their possible interest in its outcome; that such persons are "witnesses" in the sense in which that term is customarily used under cognate administrative investigation provisions of other federal statutes; and that no reason exists to construe the term differently in this statute.

field offices throughout the country.[20] Frequently it will pass on to the field offices information which may be material to the enforcement of some part of the Act or to the administration of the Service.[21]

[20] The duties of this office were described by the Senate Committee on the Judiciary as follows (S. Rep. No. 1515, 81st Cong., 2d sess., p. 296):

> This section is responsible for supervising and directing (1) investigation of the cases of aliens believed to be in the United States illegally; (2) investigation of suspected violations of penal provisions of the laws, the enforcement of which is the responsibility of the Immigration and Naturalization Service, that criminal proceedings shall be instituted when violations have been established; (3) investigation of applicants for naturalization to determine whether the requirements for naturalization have been met; (4) all other investigative work of the Immigration and Naturalization Service, irrespective of whether such work originates from the application of the immigration laws, nationality laws, or other laws administered by the Immigration and Naturalization Service; (5) apprehension of aliens who are subject to deportation; and (6) maintenance of records on known and suspected smugglers and their operations.

[21] This relationship was described in the Annual Report of the Immigration and Naturalization Service for the Fiscal Year Ending June 30, 1953, p. 57, as follows:

"Coordination, supervision, and planning of Service investigative activities have been emphasized. These have been attained in a large measure by a uniform system of investigative reporting. Reports of investigations submitted periodically to the Investigations Division of the Central Office during the pendency of the investigation in the more important types of cases involving subversives, racketeers, narcotic peddlers, and other criminals, and the information reflected in these reports has been correlated with other information furnished by government intelligence agencies, legislative investigating committees, and other sources accessible to the Central Office. Analysis and dissemination to the Field Offices of this correlated information has enabled the investigative arm of the Service to deal more effectively with prob-

The regulation implementing Section 340(a) of the Act—the denaturalization provision—provides in part (8 C. F. R. 340.11):

> Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by willful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. * * *

An investigation in such a case is authorized by the district director only if he "is satisfied that a prima facie showing has been made that grounds for revocation exist" (*ibid.*).

At this point the probability is that the subpoena power granted under Section 235(a) of the Act will not be exercised. Most witnesses, including the witnesses who might be the subject of a future cancellation proceeding, appear voluntarily in response to the director's letter asking them to appear. They often can explain away apparent discrepancies and inconsistencies so that the investigation is closed.[22] The subpoena power is used,

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lems nation-wide in scope, such as subversive activities, organized crime, or organized rings for the production and use of fraudulent entry documents."

[22] As a matter of fact, the number of investigations has far outnumbered the number of revocations. For example, during the fiscal year ending June 30, 1952, the Service completed a total of 1,824 investigations which sought to determine possible grounds for revocation of naturalization on subversive grounds. See Annual Report of Immigration and Naturalization Service for Fiscal Year Ending June 30, 1952, p. 56. Despite this large number of investigations, the number of

however, if witnesses do not appear or produce records.

Following a full field examination, the district director is required by regulation to "report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted" (8 C. F. R. 340.11, *infra*, pp. 59-60). As a practical matter the report goes to the Office of the General Counsel of the Service where it is further studied. There, if sufficient grounds are shown, an "affidavit showing good cause" (see Section 340(a) of the Act, *infra*, p. 56) is prepared and executed, and is forwarded as an aid to the formal judicial proceedings which may be brought in the district where the naturalized citizen resides "at the time of bringing suit."[23]

Thus, the investigation is sometimes preliminary to the judicial proceeding under Section 340(a), frequently a means of determining that there is no occasion for a proceeding, but always—the important point here—separate and different from such action. Often it is merely an opportunity for the interested party to explain facts which will result in closing the case. And the most that can result

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actual cancellations in the next two succeeding years, on grounds other than residence abroad within five years after naturalization, was extremely small. In the fiscal year 1953 there were only eight such cancellations, and in 1954 there were only fifteen. Annual Report of the Immigration and Naturalization Service for the Fiscal Year Ending June 30, 1954, p. 50.

[23] See the Annual Report of the Immigration and Naturalization Service for the Fiscal Year Ending June 30, 1953, p. 59; *id.* for 1954, p. 43.

from the investigation is an intra-departmental recommendation that good cause exists to institute future judicial action. This investigative procedure is in no sense an "administrative pretrial."

The person about whom inquiry is made is as much a "witness" as anyone else who appears voluntarily or who is served with an investigative subpoena. His role, like that of any other witness, is to assist a fact-gathering process. Prior to the determination of whether any controversy exists between the naturalized citizen and the Immigration and Naturalization Service, it is impossible to consider the person investigated as a "party".

The demarcation line between the investigating and the adjudicating functions of administrative agencies generally has been clearly defined in recent years [24] and was familiar to the framers of the 1952 Act.[25] The distinguishing characteristics of

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[24] See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 199-201; *Edwards* v. *United States*, 312 U. S. 473, 481; *Kilgore Nat. Bank* v. *Fed. Petroleum Board*, 209 F. 2d 557, 560 (C.A. 5); *Tobin* v. *Banks & Rambaugh*, 201 F. 2d 223 (C.A. 5), certiorari denied, 345 U. S. 942; *N. L. R. B.* v. *Anchor Rome Mills*, 197 F. 2d 447 (C.A. 5); *Genecov* v. *Federal Petroleum Board*, 146 F. 2d 596, 598 (C.A. 5), certiorari denied, 324 U. S. 865; *Woolley* v. *United States*, 97 F. 2d 258, 262 (C.A. 9); *In re Securities and Exchange Comm.*, 84 F. 2d 316 (C.A. 2), reversed for mootness, 299 U. S. 504; Schwartz, *A Decade of Administrative Law: 1942-1951*, 51 Mich. L. Rev. 775, 784-785; Davis, *The Administrative Power of Investigation*, 56 Yale L. J. 1111, 1120-26; Davis, *Administrative Law* (1951 ed.), pp. 93-117, 120-136.

[25] The former practice of combining in an immigrant inspector both investigative and adjudicative functions was subjected to criticism by various authorities adverted to in the

the investigative subpoena power granted under an analogous statutory provision were described by this Court in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201, as follows:

> The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so.

And again in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642-643, this Court said:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a

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opinion of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36-48. Although it is not governed by the Administrative Procedure Act, the 1952 Immigration Act followed the "separation of functions" philosophy of Administrative Procedure Act Section 5(c) in many particulars. See *Marcello* v. *Bonds*, 349 U.S. 302, 307-310.

case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

See also the opinion of Judge Minton in *Bowles v. Baer*, 142 F. 2d 787, 788-789 (C. A. 7):

* * * Investigations are informal proceedings held to obtain information to govern future action and are not proceedings in which action is taken against anyone. Investigations, such as this by the OPA, have no parties and are usually held in private, just as a grand jury carries on its investigations in private. * * *

On the other hand, in a hearing there are parties, and issues of law and of fact to be tried; and at the conclusion of the hearing, action is taken which may materially affect the rights of the parties. Hearings are usually open to the public. The parties are entitled to be present in person and by counsel and to record the proceedings or be provided with a record by the hearing body. The parties to a hearing are entitled to participate therein, to argue, and to brief their case, and, if findings of fact and an order are made, they are entitled to be furnished copies.

Following the pattern of this universally recognized distinction between the investigative and the adjudicative powers of administrative agencies, there is a clear distinction between Section 235(a) of the Act, granting the subpoena power in respect to the investigative duties of the Service, and other provisions granting the subpoena power in respect to formal hearings. In Section 235(a) the subpoena power extends to "witnesses" generally. As we have pointed out, everyone who has relevant testimony to give is a "witness" for purposes of an investigation, and there is no occasion to draw a distinction between "witnesses" on the one hand and "parties", or aliens, on the other. In other sections of the Act, however, when the subpoena power is granted for a particular type of hearing, it is entirely natural that such a distinction should be drawn. Thus, there is no such significance as the court below found in the fact that four other subpoena provisions of the Act, three concerned with formal hearings and one with preliminary examination on a petition for naturalization, refer separately to the "alien" or the "petitioner" on the one hand, and to "witnesses" on the other.

The two sections referring to the "alien" are concerned with deportation (Section 242(b)) and exclusion proceedings (Section 236(a)), both obviously involving the alien as a party in interest and designed for the formal determination of issues.[26] The third section (336 (d)), empowering

[26] Cf. "The Immigration and Naturalization Service" in *Federal Administrative Procedure Act*, 56 Yale L. J. 670, 697-703.

the Attorney General to appear in any naturalization court and "to call witnesses, including the petitioner", is in the same category, except that the hearing is judicial rather than administrative. The remaining provision (Section 335(b)), relating to preliminary examinations upon petitions for naturalization and authorizing the issuance of subpoenas requiring "the attendance and testimony of witnesses, including petitioner," involves equally evident reasons for the separate designation of the "petitioner". In the first place, there is in fact a "petitioner" where there has been a petition for naturalization. Moreover, in the context of this preliminary examination, where two "witnesses" have been specifically required to verify the petition (Section 334(a)), the separate reference to the "petitioner" avoids any possibility of construing the subpoena power as being confined solely to these "witnesses".

No similar considerations apply to the general subpoena power for investigative purposes conferred by Section 235(a). In connection with investigations, including the type involved here, there are no "parties" or "petitioners", and there is no occasion to describe persons called to appear and testify with anything more than the amply comprehensive term "witnesses". To be sure, substantially every investigation under the immigration and nationality laws concerns someone who may eventually be a "party" to some proceeding. But Section 235(a) contains no locution, and the court below suggests none, which would more aptly de-

scribe such persons for purposes of investigations generally than the word "witnesses". It is as true in this investigation as in the inquiry of a grand jury that there are "no defined litigants and that none may emerge from it. * * *." *Cobbledick* v. *United States*, 309 U. S. 323, 327-328; *Blair* v. *United States*, 250 U. S. 273, 282. In both instances, those called upon to give information, whatever their potential relation to any proceeding which may ensue, are fully and simply described as "witnesses".

B. *The language of Section 235(a) defining the investigative subpoena power follows the form consistently used in other, cognate statutory provisions*

Since the enactment of Section 12 of the Interstate Commerce Act of 1887,[27] the constitutionality of which was considered in *Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447, federal statutes granting investigative subpoena power to an administrator have used the term "witness" as an inclusive term to embrace all who might have knowledge concerning the subject-matter of the investigation and whose attendance and testimony might have value. Modern statutes authorizing the power of subpoena in aid of agency investigations almost

[27] 26 Stat. 743, c. 128. This provided in pertinent part: "* * * for the purposes of this act the Commission shall have power *to require, by subpoena, the attendance and testimony of witnesses* and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." (Emphasis added.)

uniformly use the language employed in Section 235(a) ("require by subpena the attendance and testimony of witnesses") or closely similar language.[28] So far as we have been able to ascertain, the phrase in such context has never been understood to include only witnesses who have no direct interest in the outcome of the investigation. In fact, most of the cases which deal with various aspects of the subpoena power have arisen by virtue of a challenge to agency authority by persons or corporations directly interested in an investigation who have been subpoenaed to appear and testify or produce records. See *e.g., Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501; *Durkin* v. *Fisher*, 204 F. 2d 930 (C.A. 7); *Hagen* v. *Porter*, 156 F. 2d 362 (C.A. 9), certiorari denied, 329 U.S. 729; *Zinser* v. *Federal Petroleum Board*, 148 F. 2d 993 (C.A. 5); *McGarry* v. *Securities and Ex-*

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[28] An incomplete list of such investigative subpoena provisions includes: 15 U. S. C. 49 (Federal Trade Commission Act); 15 U.S.C. 77uuu(a) (Trust Indenture Act of 1939); 15 U.S.C. 78u(b) (Securities and Exchange Act of 1934); 15 U.S.C. 79r(c) (Public Utility Holding Company Act); 15 U.S.C. 80a-41(b) (Investment Company Act of 1940); 15 U.S.C. 80b-9(b) (Investment Advisors Act of 1940); 15 U.S.C. 715h (Federal Petroleum Act); 16 U.S.C. 825f (Federal Power Act); 29 U.S.C. 161(1) (National Labor Relations Act); 29 U.S.C. 209 (Fair Labor Standards Act); 38 U.S.C. 131 (Veterans Pension Act); 42 U.S.C. 405(d) (Social Security Act); 46 U.S.C. 1124 (Merchant Marine Act); 49 U.S.C. 12(1) (Interstate Commerce Act); 49 U.S.C. 644(b) (Civil Aeronautics Act). See also *Final Report, Attorney General's Committee on Administrative Procedure* (1941), pp. 414-435; Davis, *Administrative Law* (1951 ed.) pp. 97-98.

change Comm., 147 F. 2d 389 (C.A. 10); *Fleming* v. *Montgomery Ward*, 114 F. 2d 384 (C.A. 7), certiorari denied, 311 U.S. 690.

In many administrative investigations it is difficult to predict which "witnesses" may be parties to some future adversary proceeding. The very purpose of the investigation is to make that determination after questioning everyone concerned. In this respect, administrative investigations are comparable to the proceedings of the grand jury, "which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, *supra* (338 U.S. at 642-643); see also *Kilgore Nat. Bank* v. *Fed. Petroleum Board*, 209 F. 2d 557 (C.A. 5); *Genecov* v. *Fed. Petroleum Board*, 146 F. 2d 596 (C.A. 5); *Consolidated Mines* v. *SEC*, 97 F. 2d 704 (C.A. 9); *In re Securities and Exchange Comm.*, 84 F. 2d 316, 318 (C.A. 2); cf. Sherwood, *The Enforcement of Administrative Subpoenas*, 44 Col. L. Rev. 531, 537. As in the case of a general grand jury investigation, the power to issue an administrative subpoena is not dependent on a pre-judgment as to whether the person whose evidence is sought has violated the law: *Oklahoma Press Publishing Co.* v. *Walling*, *supra* (327 U.S. at 216); *Provenzano* v. *Porter*, 159 F. 2d 47 (C.A. 9), certiorari denied, 331 U.S. 816. The only question which conditions the power to issue the subpoena

is whether the person has testimony or evidence material and pertinent to the subject matter of an authorized investigation. If he does, then he comes within the category of "witnesses" and can be compelled to appear before agency investigators.

The term "witnesses" in the context of statutory provisions granting the power of investigative subpoena has, in short, become a word of fixed meaning. In the section here involved, Congress used the term in conjunction with standard language borrowed from statutory provisions of similar function. In view of this fact, and in view of the congressional purpose to make this provision meet the needs of a greatly expanded omnibus Act covering all phases of immigration and nationality law, there is no reason to believe that Congress intended to restrict the meaning of the term "witnesses" in Section 235 (a). It is far more reasonable to conclude that Congress, choosing familiar language precisely suited to its purpose, intended to grant to the Service broad "preliminary investigative authority"[29] to be exercised within the framework of the Act and implementing regulations. Such power includes, as in the case of most other administrative agencies, the power to subpoena any person having information pertinent to the subject of inquiry—in other words, any possible "witness" at the investigative stage, whatever his future status may turn out to be.

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[29] *Oklahoma Press Publishing Co.* v. *Walling*, *supra* (327 U.S. at 213, fn. 51).

C. The construction of Section 235(a) by the court below is unsupported by any relevant criterion of interpretation

As the opinion of the Fifth Circuit in *Lansky, et al. v. Saveretti* observes (220 F. 2d 906, 909), the analysis of Section 235(a) by the court below results in a "dry * * * interpretation of a single word in a broadly comprehensive act, with the effect of greatly impairing its scope and efficiency and the further effect of defeating its underlying purpose, to discover those who have taken false advantage of the naturalization privilege and to deprive them of the fruits of their fraud". We have shown that the opinion below fails to distinguish between administrative investigative procedures and discovery procedures incident to adjudication. There are other infirmities in its reasoning.

The opinion confines itself to a holding that the term "witnesses" in the context of Section 235(a) does not include a person under investigation for the fraudulent obtaining of the indicia of citizenship. It then states (R. 21):

> We neither consider nor intimate any opinion upon any of the countless other situations in which immigration officers may undertake to require by subpoena the appearance and testimony of interested persons in administrative inquiries.

But it is difficult to perceive how the term "witnesses" in the broad context of Section 235(a)

could mean one thing as applied to naturalization fraud investigations, and another in its relationship to other investigations conducted by the Service. The term "witnesses" in the narrower context of Section 16 of the Immigration Act of 1917 (see pp. 16-17, *supra*) was deemed sufficiently broad by the court below to include within the subpoena power an alien who was not only the subject of an investigation but a party to a deportation proceeding. *Loufakis* v. *United States*, 81 F. 2d 966 (C. A. 3); see also *Graham* v. *United States*, 99 F. 2d 746 (C.A. 9). Since, as we have developed above, an investigation of naturalization frauds is not an inevitable prelude to adjudicative proceedings, there is in such investigation even less reason to exclude from the category of "witnesses" the person being investigated.

Another defect in the approach of the court below is its assumption (R. 29) that a rule of strict construction is applicable to the interpretation of the term "witnesses" in Section 235(a). If there were an ambiguity here, which we deny, and if the provision specifically related to denaturalization, it could be urged that such an ambiguity should be resolved in favor of the citizen. That, however, is not this case. Aside from the decisive fact that it contains no ambiguity, the statutory language under scrutiny merely defines the general investigative subpoena power of the Attorney General and Service officers under the Act. The power is as much concerned with inquiries into fitness to practice before the Immigration Service (*supra*, pp.

18-19, 21) as it is with denaturalization questions or any of the many other matters "material and relevant to the enforcement of this Act and the administration of the Service * * *." For all of these matters, the authority conferred by Section 235(a) is investigative, not punitive or penal. Neither the language nor the history of the provision justifies importation of the canon of "strict construction of penal statutes" where denaturalization investigations are concerned, while leaving the statute to operate as it was written with respect to other matters. The language is general. It applies here. Its purpose should not be defeated by interpolating an exception Congress did not write based upon a generalization drawn from the irrelevant context of the criminal law.

Pointing out that the Act provides for revocation of naturalization only after a judicial determination attended by appropriate procedural safeguards, the court below finds reason in this fact for denying the Attorney General's power under Section 235(a) to subpoena a person who may ultimately be involved in such a proceeding (R. 19-20). Thus, the court quotes and adopts the observation of the District Court in *In re Barnes, supra,* subsequently reversed by the Second Circuit, that (R. 20):

> If the subpenas here were allowed to stand, the judicial procedure for the revocation of naturalization certificates would be preempted by administrative action, and the provisions for

> personal notice, sixty-day time period to answer in section 340(b) of the Act, would be empty words.

This observation ignores the familiar fact, noted by the Second Circuit in its reversal in *Barnes* (219 F. 2d at 143), that "administrative investigations may be and are often intended to serve as preliminaries to adversary proceedings of a judicial character to which the United States is a party * * * ." As we have noted (*supra*, pp. 33-34, fn. 22), most investigations of the type involved here do not in fact eventuate in such proceedings. But leaving this aside, the important point remains that persons who may be subject to criminal prosecutions as well as civil suits are commonly required to obey subpoenas and attend as witnesses in administrative investigations to determine whether there is occasion to charge violations. See, *e.g.*, Internal Revenue Code of 1954, Sec. 7602; Atomic Energy Act of 1946, Sec. 12(a)(3), 60 Stat. 770, 42 U.S.C. 1812(a)(3); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186; *In re Securities and Exchange Comm.*, 84 F. 2d 316, 317 (C.A. 2); *Application of Barnes*, *supra*, at 143. Such investigations have never been considered preemptive of the judicial process, for they serve only "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." *Oklahoma Press Pub. Co.* v. *Walling*, *supra*, at 201. The ad-

ministrative and judicial proceedings are in every respect complementary to, not in conflict with, each other. Cf *United States* v. *Morton Salt Co.*, 338 U.S. 632, 643.

Of course, the person summoned in an administrative inquiry may interpose valid claims of privilege or other objections to evidence sought. But no such problem arises or has been suggested here. Respondent's minimal duty was to present himself and assert the privilege or any other objections he might have had to supplying evidence sought from him. *Brown* v. *United States*, 276 U.S. 134, 144; *Carroll* v. *Savoretti*, 220 F. 2d 910 (C.A. 5); cf. *Ex parte Irvine*, 74 Fed. 954, 960 (C.C.S.D. Ohio). As in the case of a grand jury or other administrative investigations, the dispositive point for this case is that no witness, including a person who may later become a party to a denaturalization proceeding, has an absolute immunity from attendance and testimony under Section 235(a).

We submit, in short, that the opinion below fails to establish any basis, either from the text of the Act, its history, or other general interpretative sources, for the proposition that a person investigated for possible naturalization frauds, is not a "witness" within Section 235(a). The decision of the Court of Appeals confuses the power of the Service to investigate with the power of the judiciary to revoke naturalization. It stops the fact-finding process at the threshold by depriving the Service of an important source of information, and it renders the Act far less flexible in meeting

the varying needs of an entire area of administration.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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AUGUST 1955.

APPENDIX

Pertinent provisions of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U. S. C. 1101 *et seq.*, are as follows:

Section 101(a)(18):

> The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof.

Section 103(a):

> The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform

such other acts as he deems necessary for carrying out his authority under the provisions of this Act. He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service. * * *

Section 235(a):

The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or

vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and docu-

ments relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

Section 287(b):

Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to

whom such oath has been administered, under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code.

Section 335:

(a) At any time prior to the holding of the final hearing on a petition for naturalization provided for by section 336(a), an employee of the Service, or of the United States designated by the Attorney General, shall conduct a personal investigation of the person petitioning for naturalization in the vicinity or vicinities in which such person has maintained his actual place of abode and in the vicinity or vicinities in which such person has been employed or has engaged in business or work for at least five years immediately preceding the filing of his petition for naturalization. The Attorney General may, in his discretion, waive a personal investigation in an individual case or in such cases or classes of cases as may be designated by him.

(b) The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make recommendations thereon to such court. For such purposes any such employee so des-

ignated is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to administer oaths, including the oath of the petitioner for naturalization and the oaths of petitioner's witnesses to the petition for naturalization, and to require by subpena the attendance and testimony of witnesses, including petitioner, before such employee so designated and the production of relevant books, papers, and documents, and to that end may invoke the aid of any court exercising naturalization jurisdiction as specified in section 310 of this title; and any such court may, in the event of neglect or refusal to respond to a subpena issued by any such employee so designated or refusal to testify before such employee so designated issue an order requiring such person to appear before such employee so designated, produce relevant books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. The record of the preliminary examination authorized by this subsection shall be admissible as evidence in any final hearing conducted by a naturalization court designated in section 310 of this title.

Section 340:

(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided,* That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does

not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

(c) If a person who shall have been naturalized after the effective date of this Act shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that

such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

(d) If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material

fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. The diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with statements of the names of those persons within their respective jurisdictions who have been so naturalized and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to revoke and set aside the order admitting to citizenship and to cancel the certificate of naturalization.

8 C.F.R. 340.11 provides:

Investigation and report: Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the

Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.

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No. 35

IN THE

Supreme Court of the United States

October Term, 1955.

UNITED STATES OF AMERICA,
Petitioner,

vs.

ABRAHAM MINKER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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8 CFR:
Section 235 ..... 9, 35

8 CFR:
Section 235.6 35

8 CFR:
Section 340.11 35

Congressional Material:

H. Rep. No. 1365, 82d Cong., 2d Sess. 12, 14
Initial Draft of Report on S. 716, Chapters 4, 5, 6, and 7 of Title II 15
Original of Analysis on S. 3455 14
S. Rep. No. 1137, 82d Cong., 2d Sess. 12, 14

Frankfurter, Some Reflections on the Reading of the Statutes, 47 Col. Law Review, 529 9

New York Times, April 28, 1953, p. 1, col. 2 11

Roche, Pre-Statutory Denaturalization, 35 Corn. L. Q. 120 18

Sutherland, Statutory Construction 16

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1955. No. 35.

UNITED STATES OF AMERICA,
Petitioner,

vs.

ABRAHAM MINKER.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 16-21) is reported at 217 F. 2d 350. The memorandum opinion of the District Court in the prior proceedings to quash the subpoena, *In re Minker*, is reported at 118 F. Supp. 264.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 1, 1954 (R. 21), and a petition for rehearing was denied on January 6, 1955 (R. 22). On January 29, 1955, by order of Mr. Justice Burton (R. 22), the time for filing a petition for a writ of certiorari was extended to March 7, 1955. The petition was filed on February 28, 1955, and was granted on April 11, 1955 (R. 23; 349 U. S. 904). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether, under the subpoena power conferred by Section 235(a) of the Immigration and Nationality Act of 1952, an immigration officer may subpoena a naturalized citizen to appear before him and testify in order for the Government to determine whether possible grounds exist for the institution of proceedings seeking the revocation of his citizenship.

2. Whether, under our separation of powers theory of government, the above subpoena power may be constitutionally delegated to an immigration officer.

3. Whether this application of the above subpoena power is a violation of due process.

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATIONS INVOLVED.

Constitutional provisions, pertinent portions of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U. S. C. 1101 et seq., and the applicable regulations of the Immigration and Naturalization Service are set forth as an Appendix, *infra*, pp. 24-35.

STATEMENT.

On September 8, 1953, the District Director of Immigration and Naturalization, at Philadelphia, Pennsylvania, issued a subpoena directed to respondent commanding him to appear and testify at the District Office of the Immigration and Naturalization Service located in the Lafayette Building, 5th and Chestnut Streets, Philadelphia, Pa., on September 16, 1953 (R. 3). On September 11, 1953, a motion was filed to quash the subpoena on the grounds (1) that it did not disclose the nature of the investigation, (2) that there was no authority or jurisdiction for an immigration officer to subpoena the attendance and testimony of a person who is a citizen of the United States against himself, and (3), that its provisions were unreasonable and oppressive (R. 12).

At the argument on the motion, it was admitted by the Government that respondent was a naturalized citizen of the United States who was admitted to citizenship in 1945; that an investigation was pending by the Immigration and Naturalization Service in connection with the possible institution of proceedings seeking the revocation of his citizenship; that the testimony sought from respondent concerned *only himself*; that at the time he was served with the sub-

poena he was a resident of Reading, Pennsylvania, and had resided there for over forty years (R. 17). The motion to quash was denied (R. 16; *In re Minker*, 118 F. Supp. 264).

The District Director thereupon notified respondent to appear on January 5, 1954, in accordance with the terms of the original subpoena and advised him that his attendance is commanded in order that he should give testimony "in connection with and relating to the possible institution of proceedings seeking the revocation of your naturalization in accordance with Section 340 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1451)" (R. 4).

Upon his failure to comply, the District Court, on application of the District Director, entered an order on March 29, 1954, directing that the respondent appear and testify before the District Director of Immigration and Naturalization or his duly authorized delegated representative at such time as the District Director shall, upon not less than ten days' written notice require (R. 5). No appeal was taken from this order. *Loufakis v. United States*, 75 F. 2d 627 (C. A. 3); *Cogen v. United States*, 278 U. S. 221. A hearing was fixed by the District Director of Immigration and Naturalization on May 13, 1954; the respondent did not appear and testify. On June 3, 1954, after a hearing, respondent was adjudged in contempt and fined five hundred dollars (R. 9-10). On appeal the judgment was reversed, the Court of Appeals stating: "We conclude that a citizen confronted with an administrative proceeding which poses a challenge to his right to retain citizenship is not to be regarded as a 'witness' within the meaning of Section 235 (a) or required under that Section to appear and testify against himself" (R. 20).

SUMMARY OF ARGUMENT.

A. The plain language of Section 235 (a) empowering the Attorney General and any immigration officer to subpoena *witnesses* for testimony, "relating to the privilege of any *person* to enter, re-enter, reside in, or pass through the United States *or* concerning any matter which is material or relevant to the enforcement of this Act and administration of the Service," (Emphasis supplied) does not *authorize* an immigration officer to subpoena respondent, a naturalized citizen, to appear before him and testify in order for the Government to determine whether possible grounds exist for the institution of denaturalization proceedings against the respondent.

The word "witnesses" as used in Section 235 (a) means exactly what Congress said—witnesses. The Government contends that the word "witnesses" embraces all persons including naturalized citizens who must testify concerning their "privilege" to enter or reside in the United States or any other "matter". No such meaning can possibly be squeezed out. If Congress had wanted to grant to the Immigration and Naturalization Service the right to subpoena all persons in all "matters" including their own denaturalization proceedings, it could have easily said so, but there is not the slightest hint anywhere that Congress had such intention.

This plain meaning is fortified by the context of the entire section 235 (a) which is concerned with the entry and exclusion of aliens and is so titled; by other sections of the statute; by the legislative history which cautions against the use of this section to harass citizens; by the fact that in Section 340, of the same statute, Congress carefully outlined a judicial procedure to accomplish denaturalization; by the various rules of statutory interpretation which teach that statutes touching the liberties of all citizens

must be construed not esoterically but liberally; all these methods utilized, conclusively reveal that the sole purpose of Section 235 (a) was to investigate aliens and not to subpoena citizens in their own denaturalization cases.

The Government's chief contention, that Section 235 (a) contains a general grant of subpoena power (U. S. Br. 27), is without merit, since Congress specifically granted the power to subpoena in Section 335 (b) for pre-naturalization examinations. If the general power to subpoena existed by virtue of Section 235 (a), this separate grant of subpoena power in Section 335 (b) would not have been necessary.

B. The judicial power of the United States is vested in our Courts. Since a judgment of naturalization is a judgment like all other judgments of a court of record, final and conclusive on all parties, the subpoena power as applied in this case would violate our separation of powers theory of Government. Proceedings to open a judgment of naturalization are judicial in nature not administrative. A judgment of naturalization may be attacked, but only by court action and not by an immigration officer.

The Government's contention that the doctrine of *United States v. Morton Salt Company*, 338 U. S. 632, permits the subpoena action in this case is quite erroneous. In the *United States v. Morton Salt Company*, supra, at pages 638, 639, Justice Jackson speaking for this Court declared:

> "It seems conceded, however, that some power or duty, independently of the decree, must still have resided in the Commission. Certainly entry of the court decree did not wholly relieve the Commission of responsibility for its enforcement. The decree recognized that. It left to the Commission the right and hence the responsibility 'to initiate contempt proceedings for the violation of this decree.' This must have contemplated that the Commission could obtain accurate information from time to time on which to base a responsible conclusion that there was or was not

cause for such a proceeding. The decree also required the original report showing the manner and form of each respondent's compliance to be filed, not with the court but with the Commission. Presumably the Commission was expected to scrutinize it and, if insufficient on its face, to reject it and move the court to take notice of the default. And the duty likewise was left upon the Commission to move the court if any respondent made a false report. The duty would appear to be the same if a temporary compliance were truly reported but conduct resumed which would violate the decree. In addition, the Trade Commission has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce. That responsibility as to all within the coverage of the Act is not suspended or exhausted as to any violator whose guilt is once established."

The Immigration and Naturalization Service has no such "continuing duty" by statute, to check on citizens who have become naturalized. The entry of a judicial decree conferring citizenship is final and absolute. Congress did not leave to the Immigration and Naturalization Service the "residual duty" to reexamine the citizen in pre-denaturalization hearings. A judicial remedy was *specifically* provided for revocation proceedings in Section 340 of the Immigration and Nationality Act.

C. If the essence of due process is "fair play," compelling a citizen many years after he has been naturalized to supply his own dossier to an immigration officer conducting a denaturalization investigation shockingly violates our American concept of "fair play".

Immigration officers could subpoena over and over again a naturalized citizen—perhaps one who has obtained his citizenship over their objections—in order to find "good cause". Res judicata would not apply to such administra-

tive actions. After citizenship was conferred upon respondent by a judicial decree, to attempt to deprive him of the full benefit of that decree in this non-judicial proceeding, is a "taking" of his liberty without due process.

This Court should not construe the subpoena power conferred by Section 235 (a) of the Immigration and Nationality Act so that the Government may treat a naturalized citizen as if he were still an alien.

ARGUMENT.

I.

An immigration officer has no power under Section 235 (a) of the Immigration and Naturalization Act to subpoena a naturalized citizen to appear before him and give testimony in order to determine whether possible grounds exist for the institution of proceedings seeking revocation of his citizenship.

A. The plain statutory language, the context in which Section 235 (a) appears, the legislative history and the spirit of the statute sustain this conclusion.

1. The Government relies for its authority to subpoena the respondent, a naturalized citizen, to give testimony before an officer of the Immigration and Naturalization Service "in connection with and relating to the possible institution of proceedings seeking the revocation of your naturalization in accordance with Section 340 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1451)" (R. 4), on the following sentence scooped out of Section 235 (a) of the Act:

> "The Attorney General and any immigration officer, including special inquiry officers, shall have power to

require by subpoena the attendance and testimony of *witnesses* before immigration officers and special inquiry officers and the production of books, papers and documents relating to the *privilege* of any person to enter, re-enter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and administration of the Service, and to that end may invoke the aid of any court of the United States." (Emphasis supplied.)

This reliance is clearly erroneous. The Government's strained and tortured interpretation of Section 235 (a) is plainly refuted by the literal language and meaning of the sentence itself. The word "witnesses" means exactly what it says, witnesses, and special kind of witnesses, witnesses, "relating to the privilege of any person to enter. * * *" The phrase, "or concerning any matter which is material and relevant to the enforcement of this Act and administration of the Service" is specifically limited by what precedes.

The plain purpose[4] of Section 235 (a) was to permit an inspection and examination of all persons who were seeking to enter the United States in order to exclude those who had no "privilege" to enter or reside[5] and to obtain evidence to achieve this purpose. No other meaning should be squeezed out. The very section on which the Government

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[4]The Immigration and Nationality Act of 1952 should be read in its entirety to understand its design, not just a single sentence. Justice Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 529, 537 (1947).

[5]Section 235 (a) of the Act is listed under Chapter 4 "Provisions Relation to Entry and Exclusion" 66 Stat. 163 (1952). Significantly the regulations promulgated by the Immigration and Naturalization Service that apply to Section 235 (a) under the Act, 8 C. F. R. Part 235 (1953), are entitled "Inspection of Aliens Applying for Admission."

relies for its authority to subpoena the respondent explains the meaning of the word "person" as used in the context in which it occurs:

> "The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, re-enter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and where such action may be necessary, to make a written record of such evidence." (Emphasis supplied.)

A word is judged by the company it keeps. The word "person" is clearly used in this sentence as meaning an individual who is suspected of being an alien; the meaning does not change two sentences later. Section 235 (a) goes on to provide that:

> "Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently, and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in Section 1182 of this title."

None of these questions could be asked by an immigration officer if he *knew* that the person was a United States citizen. It is certainly not a "privilege" for a citizen to enter, re-enter, or reside in the United States—it is an abso-

lute right,[3] unlike the position of an alien who seeks admission to this country. *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537.

The language employed in the statute is at least, if not conclusive, the foremost guide to legislative intention. *United States v. American Trucking Association*, 310 U. S. 534, 543 n. 18; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 390-5.

Since the Government *conceded* that respondent is a naturalized citizen of the United States, the immigration officer had no authority or jurisdiction[4] to subpoena respondent for examination; and therefore the District Court could not properly order him to respond "to a subpoena issued under this subsection."

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[3] President Eisenhower in a letter to Senator Arthur V. Watkins on April 6, 1953, wrote:

"In the State of the Union Message I pointed out that 'existing legislation contains injustices'. Among the administrative provisions of the law which it is claimed may operate with unwarranted harshness are the following:

. . . . . .

The provision which permits an immigration official to interrogate without warrant 'any alien or person believed to be an alien as to his right to be or to remain in the United States'. It is said that unless the word 'believe' is clarified so as specifically to require 'probable cause', an abuse of this authority could possibly subject any citizen to improper interrogation." N. Y. Times, April 28, 1953, p. 1, col. 2. The President was referring to Section 287(a) of the Act, but his remarks are equally applicable to Section 235(a).

[4] In **United States v. Watkins**, 165 F. 2d 1017, 1018 (C. C. A. 2nd 1948), the Court stated: "Whether the appellant's detention is unlawful depends, as he well says, upon whether he is an alien. If he is a citizen, he was unlawfully detained, for neither the Director of Immigration and Naturalization nor a Board of Special Inquiry has any power to exclude a citizen."

In **Ng Fung Ho v. White**, 259 U. S. 276, 285, this Court stated, "Jurisdiction in the Executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."

2. The Immigration and Nationality Act of 1952 is an organism and Section 235 (a) must be placed in the context of the legislation as a whole. The preceding section 234 provides for the physical and mental examinations of persons seeking admission; and Section 236 logically provides for special inquiry if the arriving alien is detained: "* * * Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section * * * and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry which shall be kept separate and apart from the public, the alien may have one friend or relative present." Again, "person" here means alien or one who is suspected of being an alien. So viewed, it precludes the esoteric interpretation of Section 235 (a) urged by the Government.

Section 340 of the Act provides for judicial revocation of naturalization.[5] The normal place for the statutory power to subpoena a naturalized citizen in connection with possible denaturalization proceedings would be in Section 340. "Its absence is persuasive evidence that Congress did not intend to create a new method of obtaining evidence in denaturalization proceedings." See Section 340 (i), (j).

In *Johannessen v. United States*, 225 U. S. 227, this significant language appears:

> "It (the statute) merely provides that, on good cause shown, the question whether one who claims the privi-

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[5] Since the statute prescribes that good cause must be shown for institution of denaturalization proceedings, this provision would be circumvented by an administrative proceeding involving the party litigant at the time when admittedly no good cause existed, since if it did the complaint in denaturalization proceedings would be filed.

[6] When Congress changed the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact, or by wilful misrepresentation, the Senate and House Reports accompanying the Bills specifically referred to this change. S. Rep. No. 1137, 82d Cong. 2d Sess., p. 45; H. Rep. No. 1365, 82d Congress 2d Sess., pp. 82, 83.

lege of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance shall be examined and determined in orderly judicial proceedings."

Clearly, an examination before an immigration officer is not a judicial proceeding. And in the commentary on the Immigration and Nationality Act, the Legislative Assistant to the Committee on the Judiciary of the House of Representatives stated: "All proceedings designed to cause the revocation of naturalization must be instituted by a United States Attorney, in a Court authorized to naturalize aliens in the judicial district in which the naturalized citizen resides at the time the suit is brought." 8 U. S. C. Page 87.

In Section 287 of the Immigration and Nationality Act, the powers of the immigration officers and employees are defined. If Congress intended to give immigration officers the right to subpoena a naturalized citizen to obtain information in connection with possible denaturalization proceedings, it would have written it in this section. Its absence suggests that no such power was ever intended by Congress.

The Government's main prop is that Section 235 (a) is a general grant of subpoena power (U. S. Br. 27), since it could not contend that it was written specifically for denaturalization purposes. The prop, however, is a broken reed, for Congress was obliged *to specifically grant the power to subpoena* in Section 335 (b) for pre-naturalization examinations. If the general power to subpoena existed as contended by the Government, by virtue of Section 235 (a), this separate grant in Section 335 (b) would not have been necessary.

3. Changing the former word "alien" to "person" as the pertinent legislative history[7] makes clear, although ignored

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[7] "* * * In conjunction with their inspection of aliens, the bill authorizes the immigration officers to board and search vessels, air-

by the Government, merely broadens the right to question those persons who might claim that they are citizens but whom the immigration officer "believes or suspects to be aliens."

The addition of the phrase: "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service," is as the literal

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craft, railway cars or any other conveyance or vehicle in which they believe aliens are being brought into the United States. The Immigration officers are empowered to administer oaths, take evidence and make a record, if necessary, concerning the enforcement of the bill with reference to the privilege of any alien to enter, pass through, or reside in the United States. Any person coming to the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain, whether or not he intends to remain permanently, whether, if an alien, he intends to become a citizen, and such other information as will aid the immigration officers in determining whether the person is a national of the United States or an alien, and, if the latter, whether he is subject to exclusion under any of the provisions of the bill. It is not intended by this provision to sanction the indiscriminate questioning or harassment of citizens returning to the United States, but it is to be used by the immigration officers whenever there is reason to believe that a citizen is violating or about to violate the law and is about to become expatriated. Immigration officers are also granted the power to subpoena the attendance and testimony of witnesses and the production of books, papers, and documents in aid of the enforcement of the provisions of the bill. An alien who does not appear, to the examining immigration officer to be admissible, clearly and beyond a reasonable doubt, shall be detained for further inquiry by a special inquiry officer. * * *" S. Rep. No. 1137, 82d Cong. 2d Sess., p. 27; H. Rep. No. 1365, 82d Cong. 2d Sess., p. 55.

[fn] In the document entitled, "Original of Analysis on S. 3455, a Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, and For Other Purposes," there appears the following discussion of Section 235 (a) (pp. 235-4 and 235-5):

> "The second objective which the Service would like to see accomplished in connection with this subsection (Section 235 (a) is to provide specific authority to administer oaths and to question not only aliens who seek to enter the United States, but also nationals of the United States, and to compel testimony by subpoena in such cases. * * *"

Obviously the subpoena power was sought only to question persons seeking to enter the country. **Barber v. Gonzales**, 347 U. S. 637.

language and the legislative history shows, a mere "housekeeping" provision* for the Service.

The Government concedes that denaturalization proceedings were not specifically referred to in the documents, as indeed it must (U. S. Br. 18-21). Probably, the various Courts of Appeals in considering the effect of this phrase, did not have access to these legislative documents; a not unusual situation. See concurring opinion of Justice Jackson in *United States v. Public Utilities Commission*, 345 U. S. 295, 319.

Furthermore, the doctrine of *ejusdem generis*, which is here applicable, declares that where general words follow specific words in an enumeration, describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. The Government seeks, however, to expand the meaning of this *phrase* so that it should in effect read, "or" proceedings to obtain testimony from a naturalized citizen in order to determine whether possible grounds exist for denaturalization proceedings against him.

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*In the document entitled, "Initial Draft of Report on S. 716, Chapters 4, 5, 6 and 7 of Title II" prepared by the Service for use of the two congressional committees at the time the bill which became the final Act was being considered, it was stated (pp. 235-3 and 235-4):

It is to be noted that section 235 (a) specifically provides that not only immigration and special inquiry officers but also the Attorney General shall have the power to administer oaths, to take evidence and to issue subpoenas. By vesting such powers in the Attorney General, this will make certain that the Attorney General will be in a position to delegate such power to any employee of the Service, as provided in section 103.

* * * * * * * * * * *

In addition, this sub-section contains a provision permitting inquiry under oath and by subpoena concerning any matter relevant to the enforcement of this Act, and the administration of the Service. These provisions will be of great value in connection with such matters as, for example, investigation of applications for admission to practice as attorneys or representatives before the Service and the Board of Immigration and Appeals.

But when a choice has to be made between two readings, it is appropriate in a denaturalization proceeding not to choose the harsher alternative unless Congress has spoken in plainer words. *Mandoli v. Acheson*, 344 U. S. 133.

4. Finally, even if the literal language of Section 235 (a) were to yield to the meaning sought by the Government in its sixty page brief, "There are times when even the literal expression of legislation may be inconsistent with the general objectives or policy behind it, and on the basis of the equity or spirit of the statute, the Courts rationalize a restricted meaning of the letter." [9]

This Court has wisely declared:

> "It is the duty of the courts under those circumstances to say that, however broad the language of the statute may be, the act, although within the letter is not within the intention of the legislature, and therefor cannot be within the statute." *Holy Trinity Church v. United States*, 143 U. S. 457, 472 (1892). See *Markham v. Cabell*, 326 U. S. 404, 409 (1945).

This doctrine of equitable construction of statutes familiar in Anglo-American law, is particularly appropriate to prevent the injustice, the hardship, and the absurd result which would be the consequence of a literal application of the law in the case at bar.

The Immigration and Nationality Act provides a method whereby if good cause exists for revocation of naturalization, the Government may institute proceedings in "any court." It does not provide a method whereby the naturalized citizen may be re-examined over and over again by the Immigration and Naturalization Service in connection

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[9] Sutherland, Statutory Construction (3d Ed.), Section 6006. In **United States v. Carbone**, 327 U. S. 633, 637, the term "Whoever" as used in the Anti-Kickback Act was construed in the context of the entire statute so as to exclude union officials.

with the "possible institution of proceedings seeking the revocation" of his naturalization.

The Government is here attempting to treat a naturalized citizen as if he were still an alien.[10] We submit that naturalization cuts the umbilical cord that binds an alien to the Immigration and Naturalization Service.

II.

Congress may not under our separation of powers theory of government constitutionally grant to an immigration officer the power to subpoena a naturalized citizen to appear and testify before him in order that a determination be made whether the possible grounds exist for the institution of proceedings seeking the revocation of his citizenship.

In 1881, the Supreme Court declared in *Kilbourn v. Thompson*, 103 U. S. 168, 191, that all powers of Government are divided into executive, legislative, and judicial, and that it is "essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own determination and no other. * * *"

The judicial power of the United States is vested in our Courts, Article III of the Constitution. "The function of admitting to citizenship has been conferred exclusively upon Courts continuously since the foundation of our Government. * * * The judgment entered, like other judgments of a court of record is accepted as complete evidence of its

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[10] There is a difference, ignored by the Government, that is responsible for its misinterpretation of the decisions in **Loufakis v. United States**, 81 F. 2d 966 (C. A. 3); **Graham v. United States**, 99 F. 2d 746. See **United States v. Vivian**, 224 F. 2d 53, 56 (C. A. 7).

own validity unless set aside. It may not be collaterally attacked." *Tutun v. United States*, 270 U. S. 568, 576, 577; *Sherrer v. Sherrer*, 334 U. S. 343.

This subpoena action by the immigration inspector is an attempt to obtain testimony from the successful party in a prior judicial case in order to possibly institute proceedings to reopen this judgment. This is clearly a collateral attack by an immigration officer on the judgment of naturalization rendered in a Court and violative of the fundamental principle of separations of powers set forth in the Constitution. No matter with what glorified perfume the Government seeks to spray its action, it is clearly an encroachment on the judicial process.

This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant, we are dealing here with a court decree. In acting upon the original petition for naturalization the Naturalization Court exercised a judicial power. If the Government wishes to re-examine the judgment granting a certificate of citizenship after that judgment has become final, it has a remedy under Section 340 of the Immigration and Nationality Act.[11]

It has been long established that in our system of separated powers the regulation of immigration is exclusively in the hands of Congress and the Executive. *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892); *Lem Moon Sing v. United States*, 158 U. S. 538 (1895). This plenary power has been called a "fundamental attribute of sovereignty" and "indispensable to the national welfare and safety." Gordon, The Immigration Process and National Security, 24 Temple L. Q. 302, 303 (1951), knowing no limitations other than those which are self-imposed. Thus the judiciary has no voice on whether or not to exclude or admit a given alien. *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537 (1950).

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[11] The authority of the Courts to denaturalize is not even dependent on statute. Roche, Pre-statutory Denaturalization, 35 Corn. L. Q. 120 (1949).

But it has also been long established that "under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency." *Luria v. United States*, 231 U. S. 9, 22. The priceless benefits of that status should not be endangered or taken away without the clearest sort of proof under *rules of evidence*, as applied in Courts. "The difference in security of judicial over administrative action has been adverted to by this Court." *Ng Fung Ho v. White*, 259 U. S. 276, 285.

The Government contends that the doctrine of *United States v. Morton Salt Co.*, 338 U. S. 632 and the fact that the language of Section 235 (a) defining the investigative subpoena power follows the forms used in other statutory provisions, is proof that the Immigration and Naturalization Service has the power to issue subpoenas to obtain information from a naturalized citizen *about himself*. The reliance of the Government here is badly misplaced.

In the *United States v. Morton Salt Company*, supra, at pages 638, 639, Justice Jackson speaking for this Court declared:

> "It seems conceded, however, that some power or duty, independently of the decree, must still have resided in the Commission. Certainly entry of the court decree did not wholly relieve the Commission of responsibility for its enforcement. The decree recognized that. It left to the Commission the right and hence the responsibility 'to initiate contempt proceedings for the violation of this decree.' This must have contemplated that the Commission could obtain accurate information from time to time on which to base a responsible conclusion that there was or was not cause for such a proceeding. The decree also required the original report showing the manner and form of each respondent's compliance to be filed, not with the court but with the Commission. Presumably the Commission was expected to scrutinize it and, if insufficient on

its face, to reject it and move the court to take notice of the default. And the duty likewise was left upon the Commission to move the court if any respondent made a false report. The duty would appear to be the same if a temporary compliance were truly reported but conduct resumed which would violate the decree. In addition, the Trade Commission has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce. That responsibility as to all within the coverage of the Act is not suspended or exhausted as to any violator whose guilt is once established."

The Immigration and Naturalization Service has no such "continuing duty" by statute to check on citizens who have become naturalized. The entry of a judicial decree conferring citizenship is final and absolute. Congress did not leave to the Immigration and Naturalization Service the "residual duty" to determine whether the decree had been secured by fraud. A judicial remedy was specifically provided for revocation proceedings in Section 340 of the Immigration and Nationality Act.

Furthermore, in *United States v. Morton Salt Company*, supra, at page 649, this Court stated:

> "Respondents are in a class subject to inquiry, the call is for what appears to be a special report, and the matter to be reported would seem to be as the business conduct and practices about which the Commission is authorized to inquire."

"Witnesses" as used in Section 235 (a), is specifically limited to investigations against persons whom the Government believes are not citizens. The subpoena provisions in 15 U. S. C. 49 (Federal Trade Commission Act) reads, "relating to any matter under investigation". But the matter under investigation must be within the jurisdiction of the agency. The Federal Trade Commission cannot subpoena

a citizen to determine whether to institute denaturalization proceedings. The Immigration and Naturalization Service cannot subpoena a person to determine whether he is engaged in an unfair method of competition.

Obviously, the Immigration and Naturalization Service has no authority to subpoena a person for an examination to discover how he obtained his citizenship—the "matter" is simply not in the class subject to its inquiry—and such usurpation of power is unconstitutional. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 421; *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 25. Statutes should be construed so as to avoid the danger of unconstitutionality. *American Communications Asso. v. Douds*, 339 U. S. 382.

If an agency has quasi-judicial powers to hold hearings and issue orders and decrees, it usually has the authority under the statute creating the agency to subpoena witnesses in order to carry out the duties delegated by Congress. The Government admits that the formal hearing, "In itself it results in no adjudication or 'decision' of any kind" (U. S. Br. 31). But since the Immigration and Naturalization Service has no statutory authority to hold hearings and issue decrees concerning the revocation of the citizenship of a person who is actually a citizen, it cannot issue subpoenas to the party involved in his own denaturalization proceeding. Such proceedings are Judicial and not Executive.

We submit, that Congress may not provide that a judgment of naturalization rendered in 1945, by an exercise of judicial power under Article III of the Constitution, be re-examined in any way by an immigration inspector by a statute enacted in 1952. The power to grant and revoke citizenship is lodged exclusively in the Courts. *Bindczyck v. Finucane*, 342 U. S. 76.

III.

The application of the above subpoena power is here a violation of due process.

If the essence of due process is "fair play",[12] compelling a citizen many years after he has been naturalized to supply his own dossier to an immigration officer conducting a denaturalization investigation shockingly violates our American concept of "fair play."

Immigration officers could subpoena over and over again a naturalized citizen—perhaps one who has obtained his citizenship over their objections—in order to find "good cause." Res judicata would not apply to such administrative actions. After citizenship was conferred upon respondent by a judicial decree, to attempt to deprive him of the full benefit of that decree in this non-judicial proceeding, is a "taking" of his liberty without due process.

This Court should not construe Section 235 (a) in such manner that compels naturalized citizens to defend in an immigration officer's examining room their right to citizenship won in the court room. In *Schneiderman v. United States*, 320 U. S. 118, 122, Justice Murphy recognizing the priceless value of citizenship declared:

> "* * * the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status. In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many

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[12] **Galvan v. Press**, 347 U. S. 522, 530.

it is regarded as the highest hope of civilized men. This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. But such a right once conferred should not be taken away without the clearest sort of justification and proof. So, whatever may be the rule in a naturalization proceeding (see United States v. Manzi, 276 U. S. 463, 467, 72 L. ed. 654, 655, 48 S. Ct. 328), in an action instituted under 15 for the purpose of depriving one of the precious right of citizenship previously conferred, we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. * * *"

To create another Ellis Island—for naturalized citizens only—is clearly a violation of due process.

CONCLUSION.

Although immediately we are concerned with only one person, the respondent, actually millions of naturalized citizens would be subject to continuous microscopic examinations by the Immigration and Naturalization Service officials from which the native born would be exempt. Even if such discrimination were constitutional, we believe that a clearer statutory mandate than the one the Government relies on is necessary for such enormous power.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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Counsel for Respondent.

APPENDIX.

Constitutional provisions, pertinent provisions of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U. S. C. 1101 et seq., are as follows:

ARTICLE III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

AMENDMENT V.

No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *

Section 101(a)(18):

The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof.

Section 103(a):

The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or

diplomatic or consular officers: Provided, however, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling: He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act. He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service. * * *

Section 234:

The physical and mental examination of arriving aliens (including alien crewmen) shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the special inquiry officers, any physical and mental defect or disease observed by such medical officers in any such alien. If medical officers of the United States Public Health Service are not available, civil surgeons of not less than four years' professional experience may be employed for such service upon such terms as may be prescribed by the Attorney General. Aliens (including alien crewmen) arriving at ports of the United States shall be examined by at least one such medical officer or civil surgeon under such administrative regulations as the Attorney General may prescribe, and under

medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical officers of the United States Public Health Service who have had special training in the diagnosis of insanity and mental defects shall be detailed for duty or employed at such ports of entry as the Attorney General may designate, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens who it is suspected may be excludable under paragraphs (1)-(4) or (5) of section 1182 (a) of this title, and the services of interpreters shall be provided for such examination. Any alien certified under paragraphs (1)-(4) or (5) of section 1182 (a) of this title, may appeal to a board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and any such alien may introduce before such board one expert medical witness at his own cost and expense * * *

Section 235 (a):

The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien

to enter, re-enter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien, and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have the power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, re-enter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpoena issued under this sub-section or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

Section 236:

(a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this sub-section) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 1225 and 1357 (b) of this title, and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

(b) From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 1225 (c) of this title. From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attor-

ney General. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as provided in section 1225 (c) of this title such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

(c) Except as provided in subsections (b) or (d) of this section, in every case where an alien is excluded from admission into the United States under this chapter or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

(d) If a medical officer or civil surgeon or board of medical officers has certified under section 1224 of this title that an alien is afflicted with a disease specified in section 1182(a)(6) of this title, or with any mental disease, defect, or disability which would bring such alien within any of the classes excluded from admission to the United States under paragraphs (1)-(4) or (5) of section 1182(a) of this title, the decision of the special inquiry officer shall be based solely upon such certification. No alien shall have a right to appeal from such an excluding decision a special inquiry officer. If an alien is excluded by a special inquiry officer because of the existence of a physical disease, defect, or disability, other than one specified in section 1182(a)(6) of this title, the alien may appeal from the excluding decision in accordance with subsection (b) of this section, and the provisions of section 1183 of this title may be invoked. * * *

Section 287:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process

issued by any officer under any law regulating the admission, exclusion or expulsion of aliens.

(b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, re-enter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of Title 18.

(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search. * * *

Section 340:

(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground

that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this sub-section as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

(c) If a person who shall have been naturalized after the effective date of this Act shall within five years next

following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

(d) If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization; and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. The diplomatic and consular officers of the United States in foreign countries shall from time to time,

through the Department of State, furnish the Department of Justice with statements of the names of those persons within their respective jurisdictions who have been so naturalized and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to revoke and set aside the order admitting to citizenship and to cancel the certificate of naturalization.

* * * * * * * *

Applicability of certificates of naturalization and citizenship.

(i) The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subcourt, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act.

Power of court to correct, reopen, alter, modify or vacate judgment or decree.

(j) Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of any naturalization court, by or in which a person has been naturalized, to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing such person, during the term of such court or within the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court chapter, but to any naturalization heretofore granted by any to take such action. * * *

8 CFR Part 235—Inspection of Aliens Applying for Admission.

8 CFR 235.6 Pre-inspection in certain parts of the United States. * * * The examination shall be conducted in accordance with sections 234, 235, 236, and 237 of the Immigration and Nationality Act and this part and Parts 236 and 237 of this chapter, except that if it appears to the examining immigration officer that any person in the United States being examined under this section is prima facie deportable from the United States, further action with respect to his examination shall be deferred and an application for a warrant of arrest shall be made and further proceedings conducted as provided in section 242 of the Immigration and Nationality Act and Part 242 of this chapter. * * *

8 CFR 340.11 provides:

Investigation and report. Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.

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SUPREME COURT, U.S.

No. 47

IN THE
Supreme Court of the United States

October Term, 1954

IN THE MATTER
of the
Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service,

Respondent,

for process to enforce subpoena as to
SALVATORE FALCONE,

Petitioner.

IN THE MATTER
of the
Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service,

Respondent,

for process to enforce subpoena as to
JOSEPH FALCONE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Second Circuit.

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Petitioner.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Second Circuit.

To the Honorable Chief and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgments of the Court of Appeals for the Second Circuit dated and entered January 10, 1955, reversing, with directions, the judgments of the United States District Court for the Northern District of New York, entered on December 3, 1953.

Opinions Below

The opinion of the District Court filed on November 20, 1953 is reported in 116 F. Supp. 464 and appears in the certified copy of record filed herein (R. pp. 38-48) and in Appendix C. hereto (pp. 40-51). The opinion of the Court of Appeals for the Second Circuit filed on January 10, 1955 is not yet reported and appears in the certified copy of the record filed herein (R. pp. 59-75) and in Appendix A. (p. 13-31). The opinion of the District Court for the Southern District of New York in the case argued simultaneously herewith and entitled *U. S. vs. Oddo* is reported in 117 F. Supp. 323 and appears in Appendix D. hereto (pp. 52-55).

Grounds On Which Jurisdiction Is Invoked

Review is sought of judgments of U. S. Court of Appeals, Second Circuit, dated January 10, 1955 and entered January 10, 1955.

An order denying a rehearing by the U. S. Court of Appeals, Second Circuit, is dated February 8, 1955 (C. R. p. 92).

No order granting an extension of time within which to petition for certiorari was made.

The statutory provisions believed to confer on this Court jurisdiction to review the judgments in question by writ of certiorari is United States Code, Title 28, Section 1254 (1).

Questions Presented For Review

The fundamental questions presented by this petition are, viz:

1. Whether the power granted by Section 235 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. Section 1225) (McCarran-Walter Act), to an immigration officer "*to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act* * * *" has application to an investigation, the object of which is to discover evidence for use in an Equity proceeding not yet instituted pursuant to Section 340 of said Act (8 U. S. C. Section 1451), to effect the revocation and cancellation of the naturalization certificates of the petitioners herein, who are residents of the United States. (Italics supplied).

2. Whether by the exercise of said subpoena power contained in Section 235 (a) of the Act aforesaid, the petitioners herein can be compelled to give evidence against themselves which could be used against them in a subsequent proceeding instituted, pursuant to provisions of

Section 340 of the Act (8 U. S. C. Section 1451), to effect the revocation and cancellation of their naturalization certificates;

3. Whether the power to issue a subpoena granted by Section 235 (a) of Title II of the Act, entitled "Immigration", Chapter 4 subtitled "Provisions Relating to Entry and Exclusion", can be exercised in an exploratory investigation into matters which would or could ultimately lead to a judicial proceeding to denaturalize a citizen, which proceeding is provided for by Section 340 of Title III of the Act, entitled "Nationality and Naturalization".

4. Whether the word "witness" as used in Section 235 (a) of the Act, without any qualification whatsoever, can be construed to mean or include a "party" so as to subject such party to the subpoena power set forth in said Section 235 (a) of the Act.

Statute Involved

The statutory provisions involved are Sections 235 (a), 287 (b), 340, 335 (a) and (b) of the Immigration and Nationality Act of 1952; 66 Statute 163, 198, 1; (McCarran-Walter Act); 8 U. S. C. Sections 1225, 1357 (b); 1451, 1446; and Code of Federal Regulations Title 8 Sections 287.4, 335.11 and 340.11. They are printed in Appendix F. herein (pp. 60-69).

Statement

Petitioners are brothers and are duly naturalized citizens of the United States. Joseph Falcone assumed such status by an order of the Supreme Court of the State of New York, Oneida County, on February 18, 1925 and Sal-

vatore Falcone was duly admitted to citizenship by an order of the same Court dated July 21, 1925. (R. p. 55 [164]).

Petitioners emigrated to the United States on December 8, 1907, accompanied by their parents, now deceased, and at the time of entry, Joseph Falcone was 4 years old and Salvatore Falcone was 16 years old. (R. p. 55 [164]).

Prior to the issuance of the subpoenas here in question, the Immigration Service by letter addressed to Salvatore Falcone who resides in Miami, Florida, and the other addressed to Joseph Falcone who resides in Utica, New York, requested each of them to appear for an interview. Petitioners appeared at the designated time and place. That Salvatore Falcone voluntarily answered all questions, but Joseph Falcone did not answer any questions as the hearing officer refused to divulge the reason for the interview. (R. p. 13 [39]).

Subsequently, petitioners were served with subpoenas issued by the Immigration Director at Syracuse, New York, commanding petitioners to appear at Syracuse, New York to give testimony, make a statement, produce records of original entry, birth and naturalization certificates, without giving any reason or purpose therefor, or setting forth in what proceeding such testimony was required. (R. p. 9).

Petitioners appeared specially and objected to the power of the Immigration Director to issue said subpoenas against them pursuant to Section 235 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. Section 1225), on the ground that such power was granted to him only in cases involving aliens and not duly naturalized citizens of the United States. Nevertheless, they voluntarily ex-

hibited their birth and naturalization certificates. (R. p. 6 [17-18]) (R. pp. 30-35).

Thereafter, petitioners were served with orders to show cause returnable at the Federal District Court at Albany, New York, why they should not be held for contempt, and they appeared specially, objected that the subpoenas issued under Section 235 (a) of the 1952 Act were invalid as against the petitioners as naturalized citizens, and subpoenaed into Court the original naturalization records from the Oneida County Court House, Utica, New York, which records disclosed the original entry or certificates of arrival (as demanded in the subpoenas), together with all other documentary evidence, including the orders signed by a Justice of the Supreme Court of the State of New York duly admitting the petitioners to citizenship. (R. p. 40 [119]) (R. p. 55 [164]).

That the basis of the jurisdiction of the District Court is found in said Section 235 (a) of the Act.

The Immigration Service contended that Section 235 (a) confers upon it power to issue subpoenas against any person including naturalized citizens and that such power is implicitly authorized and granted by the terms of Section 287 (b)—(8 U. S. C. Section 1357 (b) of the Act of 1952), and that it is also authorized by the Code of Federal Regulations, Title 8, promulgated by the Attorney General, Sections 287.4, 335.11 and 340.11, and also that the Service needs said testimony to decide the possibility of an action in Equity against petitioners for a decree of denaturalization under Section 340 of the 1952 Act. (8 U. S. C. Section 1451).

The District Court rendered its decision in writing dismissing the application of the Immigration Service (R. pp. 38-31), Appendix C (pp. 40-51), stating in substance that an analysis of the Congressional intent as to Section 235 as expressed in House Report No. 1365, United States Code Service, 1952, pages 1709, 1710, Appendix G., and a reading of the entire Section 235 indicate that if was not intended by Congress to confer jurisdiction on the Service to issue subpoenas to naturalized citizens of the United States; also that a citizen is entitled to have his status determined by a judicial tribunal and have the security of judicial over administrative action; and that to allow the subpoena to stand, the provisions of Section 340 of the Act (8 U. S. C., Section 1451), which prescribes the judicial procedure for revocation, would be empty words, and the judicial procedure would be pre-empted by administrative action.

That appeals were taken from the District Court judgments to the Court of Appeals, Second Circuit. That on January 10, 1955, Circuit Judge Medina delivering the opinion of the court below, reversed the District Court and construed Section 235 (a) of the Act of 1952 by giving it a broad, general and extensive interpretation and the reason, as it is believed, was the court's concern that in so construing the same, it would increase the investigatory powers of the Immigration officers so that they could ferret out communists and would place the government in a position to deal more effectively with subversives.

The Court below then continued:

"This does not mean that the Falcones and Oddo are charged with or even suspected of subversion. Nothing in these records now before us indicate that

any of these respondents has ever been engaged in or had any knowledge of subversive activities of any kind. * * * (C. R. pp. 59-75) Appendix A. (p. 30). (Italics supplied).

It is interesting to note that Circuit Judge Medina in delivering the opinion of the court below, which was filed on January 10, 1955, refers therein to the *Minker* case as reported in the District Court for the Eastern District of Pennsylvania, 118 F. Supp. 264, but does not mention the judgment of reversal by the Court of Appeals for the Third Circuit which was filed on December 1, 1954. Appendix B.

REASONS FOR GRANTING THE WRIT

FIRST

That the precise question herein involved has been determined adversely to the petitioners herein by the court below, while the same question was determined in favor of a citizen in *U. S. vs. Abraham Minker*, decided December 1, 1954 by the Court of Appeals for the Third Circuit, as yet not reported and printed in Appendix B. herein (pp. 32-39).

That a conflict, therefore, exists between the decision of the Court of Appeals for the Second Circuit and the decision of the Court of Appeals for the Third Circuit on a question of great public interest and importance that should be resolved by the Supreme Court.

SECOND

Clearly, the question presented is an important question of Federal law not only for the guidance of the Attorney General and the Immigration Service in the administration of the Immigration Law of 1952, but also equally important to the determination of the rights, privileges and immunities of every naturalized American citizen of the United States.

Settlement of this question by this Court is plainly in the public interest since it will arise in almost every investigation initiated by the Immigration Service or the Attorney General by the exertion of the alleged power to subpoena a naturalized American citizen for the purpose of compelling him to give evidence against himself while under oath, prior to the actual commencement of a proceeding in Equity pursuant to Section 340 of the Act of 1952 (8 U. S. C. Section 1451), and to use such evidence to effect a cancellation of his Certificate of Naturalization.

THIRD

That the rights, privileges and immunities conferred upon and possessed by the petitioners herein by virtue of the Certificate of Naturalization granted to them over 29 years ago, and the like rights, privileges and immunities of all other naturalized citizens, are gravely jeopardized by the use of compulsion against the said petitioners through the unauthorized exercise of the subpoena power claimed to have been conferred upon the Attorney General and certain officers of the Immigration Service pursuant to Section 235 (a) of the Immigration and Nationality Act of 1952 (McCarran-Walter Act) (8 U. S. C. Section 1225).

FOURTH

That the decision of the Court of Appeals in the instant case in effect sanctions the substitution of *administrative inquiry* in lieu of *judicial determination* on the question of cancellation and revocation of the naturalization certificates of naturalized resident citizens as provided by Section 340 of the Immigration and Nationality Act of 19 (8 U. S. C. Section 1451) and is of such grave consequence to *all naturalized citizens* as to require a review thereby the Supreme Court.

In the *Minker* case, supra, the said Court of Appeals for the Third Circuit held:

1. That the power granted by Section 235 (a) of the Act of 1952 to any immigration officer to subpoena the attendance and testimony of "witnesses" before immigration officers concerning any matter material or relevant to the enforcement of said Act and the administration of the Service in a proceeding entitled "In re Minker" does not apply to Minker, since he is a party, and not a "witness" in the proceeding. Where Congress wished to make a provision as to a witness applicable to parties in interest, it said so, (citing four instances in the Act to that effect)

2. That Congress has outlined a judicial procedure with the safeguards inherent therein which must be followed to accomplish denaturalization under Section 3 of the Act and any intention on the part of Congress to minimize such safeguards by compelling the citizen to be a witness against himself in an administrative proceeding should not be found by an unnecessarily broad interpretation of the subpoena power conferred by Section 235 (a)

3. The rule of strict construction applicable to criminal statutes should also be applied to the construction of statutes having "punitive impact" such as denaturalization proceedings since loss of citizenship is a far graver penalty than most fines and prison sentences.

FIFTH

The decision of the Court below is believed to be erroneous and the conflicting decision of the Court of Appeals for the Third Circuit in *U. S.* vs. *Minker*, supra, correct.

Moreover, the decision below is in direct conflict with the applicable decisions of this Court, namely, viz: (a). A naturalized citizen is entitled to have his status determined by a judicial tribunal and have the security of judicial over administrative action. (*Bilokumsky* vs. *Tod*, 263 U. S. 149, 152); (b) The subpoena power must remain within the bounds of the legislative grant, and not to overreach the authority granted by Congress, and in investigatory matters should be conferred in expressed and explicit terms for that purpose. (*Harriman* vs. *I. C. C.*, 211 U. S. 407; *Oklahoma Press Pub. Co.* vs. *Walling*, 327 U. S. 186, 201, 217; *National Labor Board* vs. *Anchor Rome Mills*, 197 F. 2(d) 447, 449). (c) Under our Constitution, a naturalized citizen stands on equal footing with a native citizen in all respects, save of the eligibility to the Presidency. (*Osborn* vs. *Bank of U. S.*, 22 U. S. (9 Wheat) 738; *Boyd* vs. *Thayer*, 143 U. S. 135; *Lauria* vs. *U. S.*, 251 U. S. 91).

Thus, the decision of the Court below interpreting an important statute of the United States leaves the law in

a state of uncertainty and the determination of this q
tion by this Court will settle the point of law and res
the uncertainty and make for uniformity of decision.
permit the decision to stand would not only be highly
judicial to every naturalized citizen of the United Sta
but would be contrary to the rights afforded by our C
stitution.

CONCLUSION

**For the foregoing reasons, this petition for a wri
of certiorari should be granted.**

Respectfully submitted,

ANTHONY S. FALCON
Attorney for Petitioners

March 21, 1955.

APPENDIX

Appendix A.

Nos. 20, 21, 76 October Term, 1954

Argued November 5, 1954 Decided January 10, 1955

Docket Nos. 23081, 23082, 23172

Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for process to enforce subpoena as to SALVATORE FALCONE.

Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for process to enforce subpoena as to JOSEPH FALCONE.

EDWARD J. SHAUGHNESSY, as District Director, Immigration and Naturalization Service, New York District,

Petitioner-Appellant,

-against-

JOHN ODDO,

Respondent-Appellee.

Before, CHASE, MEDINA and HINCKS, Circuit Judges.

Appeals from orders of Judge Foley, United States District Court for the Northern District of New York, and Judge Weinfeld, United States District Court for the

Southern District of New York, holding invalid and unauthorized by law subpoenas, issued by an immigration officer, under Section 235 (a) of the Immigration and Nationality Act of 1952, for the discovery of evidence to support a suit for denaturalization, as provided in Section 340 of the 1952 Act. Reported below, *Matter of Falcone*, 116 F. Supp. 464; *In re Oddo*, 117 F. Supp. 323. Reversed.

Theodore F. Bowes, United States Attorney for the Northern District of New York, Syracuse, New York (Charles J. Miller, Ass't. U. S. Attorney, of Counsel; Herman K. Branse, Acting District Counsel Immigration and Naturalization Service, On the Brief), for applicant-appellant Harold E. Barnes.

Anthony S. Falcone, Utica, New York, for respondents-appellees Salvatore Falcone and Joseph Falcone.

J. Edward Lumbard, United States Attorney for the Southern District of New York, New York City (Harold J. Raby, Assistant United States Attorney and Lester Friedman, Attorney Immigration and Naturalization Service, of Counsel), for petitioner-appellant Edward J. Shaughnessy.

Kaufman & Edelbaum, New York City (Maurice Edelbaum and Seymour Teitelbaum, New York City, of Counsel) for appellee John Oddo.

MEDINA, Circuit Judge:

The sole question raised by these two appeals is whether Section 235 (a) [1] of the Immigration and Nationality Act

[1] "Sec. 235. (a) The inspection, other than the physical and mental examination of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in Section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry of-

of 1952 (the McCarran-Walter Act), 66 Statt. 163, 198-9; 8 U. S. C. A. Sec. 1225 (a), authorizes an officer of the Immigration and Naturalization Service to issue a subpoena requiring a naturalized citizen to testify, in an effort to determine if "good cause" exists for the commencement of proceedings to revoke the order admitting such person to citizenship.[2]

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[1] [CONTINUED]
ficers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

[2] "Sec. 340. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such

In the cases of Salvatore Falcone and Joseph Falcone, the Officer in Chrage of the Immigration and Naturalization Service in Syracuse, New York, applied, on notice, to the United States District Court for the Northern District of New York for orders directing the Falcones, upon whom subpoenas had been served, and who challenged the authority of the Officer to issue the subpoenas under Section 235 (a), to appear and testify. In the case of John Oddo the subpoena was issued by the District Director of Immigration and Naturalization for the New York District, Judge Dimock in the Southern District of New York made an ex parte order directing Oddo to appear and testify, and Oddo moved to vacate Judge Dimock's order. In each case it appeared that testimony was sought to relative to the possibility of instituting an action in equity pursuant to the terms of Section 340 of the Immigration and Nationality Act of 1952, for a decree of denaturalization, the Falcones having been admitted to citizenship in 1925, and Oddo in 1931. Judge Foley refused to direct the Falcones to appear and testify and Judge Weinfeld granted the motion to vacate, each holding that Section 235 (a) authorized the issuance of subpoenas only in cases involving the entry, exclusion and deportation of aliens. The identical proposition was decided contrariwise by

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[8] [CONTINUED]

person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

Judge Welsh in the District Court for the Eastern District of Pennsylvania, *In re Minker*, 118 F. Supp. 264 (1953).

An "immigration officer" is defined in Section 101 (a) (18) of the 1952 Act as "any employee or class of employees of the Service or of the United States designated by the Attorney General * * * to perform the functions of an immigration officer specified by this Act or any section thereof;" and Section 101 (b) (4) defines a "special inquiry officer" as "an immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings * * * required * * * to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General * * *." The specified classes of proceedings referred to are exclusion proceedings, Section 235 (b), and deportation proceedings, Section 242(b). Without pausing to spell out the details, it will suffice to say that the established method of selecting these immigration and special inquiry officers give assurance that they have had experience in miscellaneous phases of the work of the Immigration and Naturalization Service and possess a special competence and familiarity with the wiles and devices of those seeking in one way or another to defeat the purposes of and to evade the laws governing immigration and naturalization, which are complex and highly technical.

Those who performed analogous functions under the predecessor statute, The Immigration Act of 1917, were described in Section 16 thereof, the Section which as amended became Section 235(a) of the Act of 1952, as "immigrant inspectors." The heading of this old Section

16 reads: "Physical and Mental Examination of Alien Passengers; Regulations; Authorization of Inspectors to Administer Oaths; Appeal to Medical Boards and Personnel Thereof; Subpoena of Witnesses and Documents; Penalty." There were no "Titles" or "Chapters" as in the subsequent 1952 Act.

Section 16 provided that, "[S]aid inspectors (the immigrant inspectors) shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States * * *" and that, "[A]ny district director of immigration and naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States, and to that end may invoke the aid of any court of the United States; and any district court within the jurisdiction of which investigations are being conducted by an immigrant inspector may * * * issue an order requiring such person to appear * * * and testify; and any failure to obey such order * * * may be punished * * * as a contempt." There is no dispute about the fact that the provisions just referred to constituted the authority and machinery for administrative investigations by the Service under the 1917 Act, and this authority was widely and continously exercised.

The Revisers' Notes make it plain that the new Section 235(a) of the 1952 Act, pursuant to which the Falcone and Oddo subpoenas were issued, is the successor to the old

Section 16 of the 1917 Act. The amendments are so specific and clear as practically to determine the issue before us. The "immigrant inspectors" are now "any immigration officer, including special inquiry officers," as defined supra, and they are given by Section 235(a) power to administer oaths and to take and consider evidence "of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service * * *." And Section 235(a) proceeds to use identical language in connection with the power of "any immigration officer, including special inquiry officers" to "require by subpoena the attendance and testimony of witnesses * * * relating to the privilige of any person to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." As in the old Section 16 the appropriate District Courts are to direct such witnesses to appear and testify and to punish a refusal to testify as a contempt; and Section 287(b) repeats the key phrase above quoted in describing the powers of immigration officers and employees in administering oaths and taking and considering evidence.

Thus certain officers of the Service, designated by the Attorney General, and undisputedly including those who issued the subpoenas in these cases now before us, were explicitly given increased administrative investigatory powers. The counterpart of the phrase appearing in the 1917 Act is strengthened and broadened by the addition of the words "of or from any person," and "or person he

believes or suspects to be an alien;" and there is added, both in the part of the section relating to the administration of oaths and the taking and consideration of evidence and in that relating to the subpoena power and its enforcement by the District Courts, as well as in Section 287(b), the new and comprehensive words "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." Surely investigations of an administrative character, conducted by the very officials who by training and experience have expert knowledge of the whole subject of immigration and naturalization, and designed not merely to procure evidence to support a denaturalization proceeding under Section 340 of the Act, but to ascertain the true facts and in many if not most cases, exonerate those under investigation, are "concerning * * matter which is material and relevant to the enforcement" of the Act. True, the language is general, there is no specific reference to denaturalization proceedings; but the very generality of the terms of the statute compels the conclusion that the powers thus conferred may be exercised in reference to the enforcement of Section 340 of the Act, as well as that of all the rest. We are not at liberty to disregard language the import of which is so plain, simply because, in the allocation of "Titles," and "Chapters," and Section headings, the language conferring administrative investigatory powers is included in "Chapter 4 — Provisions Relating to Entry and Exclusion" of "Title II—Immigration," and as part of a long section headed, "Inspection by Immigrant Officers." The historical relationship between the old Section 16 of the 1917 Act and the new Section 235(a), as well as the perfectly experts thoroughly conversant with the long history of

and their iteration, completely rule out the possibility of inadvertence, confusion or ambiguity. And it is worthy of note that the Act of 1952 was not hastily thrown together. On the contrary, it is the result of years of patient study by experts thoroughly conversant with the long history of successive Acts affecting immigration and naturalization and allied matters, and having ripe experience with the practical problems with which the Service has had to grapple.

The rule of construction applicable in such cases is well restated in *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, 528-9 (1947):

> "Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. *United States* v. *Fisher*, 2 Cranch 358, 386; *Cornell* v. *Coyne*, 192 U. S. 418, 430; *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348, 354. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain."

It is said that a reading of the 1952 Act as an integrated whole demonstrates that Section 235(a) was intended to

be limited to entry, exclusion and deportation. But our reading of the Act in its entirety leaves us with a contrary impression. Moreover, if Section 235(a) is to be applicable only to entry, exclusion and deportation, as held below, what becomes of the words "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service"? Are these significant words to be left hanging in the air, as it were, and given no effect whatever?

Aside from the argument based upon the heading of Section 235(a) and the inclusion of the administrative subpoena power in Title II of the 1952 Act, relating to Immigration, and that concerning denaturalization proceedings in Title III on Nationality and Naturalization, the principal contentions of respondents stem from the difference in nature between administrative and judicial proceedings and the various provisions of the Act and the Regulations which implement it. Thus it is noted that, pursuant to the terms of Section 340, it is the duty of "the United States district attorneys for the respective districts" to institute "upon affidavit showing good cause therefor," proceedings seeking an order of denaturalization, that such proceedings are judicial in character, that the party thus sued shall have sixty days personal notice in which to answer the petition; and it is said that, if the subpoena power contended for here by the government were sustained, "the judicial procedure for the revocation of naturalization certificates would be pre-empted by administrative action." It seems to be thought that the nature of adversary proceedings of a judicial nature is such that the rights of the United States as petitioner in a denaturalization proceeding, as to discovery and other

procedural matters, should be on a parity with those of the respondent therein, despite the special interest of the government in matters relating to immigration and naturalization and the undoubted power of the Congress to make provision for investigations by government officials preliminary to the commencement of action in court. Moreover, it is said that Section 235(a) and Section 335(b) of the Act are duplicitous, and that this very alleged duplicity gives rise to an inherent ambiguity.

There is no question whatever about the fact that the investigations sought to be pursued by the issuance of these subpoenas are administrative in character and that a denaturalization proceeding is unquestionably judicial. But this presents no inconsistency; nor do we find that Sections 235(a) and 335(b) impinge upon one another in any way. Section 235(a) is purely administrative, as we have already observed. But Section 335(b) relates to proceedings for naturalization, which have since very early times been held to be judicial in character. The subpoena powers given in Section 335(b) are incidental to these judicial proceedings, and this is made clear by the language of the section to the effect that, upon a refusal by any person to obey a subpoena, any employee of the Service designated for the purpose by the Attorney General "may invoke the aid of any court exercising naturalization jurisdiction as specified in section 310 of this title; and any such court may in the event of neglect or refusal to respond," require such person to appear and testify, and, upon further failure of compliance, punish for contempt. Section 310 enumerates the state courts as well as the federal courts in which judicial proceedings for naturalization may be instituted. Thus, the careful integration of the 1952 Act indi-

cates that its several parts are closely articulated into a comprehensive, smoothly functioning whole. After the filing of a petition for naturalization, all examinations and investigations by the officers and employees of the Service designated for that purpose by the Attorney General are conducted pursuant to powers defined and described in Section 335(b). The statute and the subject matter of immigration and naturalization are sui generis; and the exercise of these administrative and judicial investigatory powers side by side and pari passu is, it seems to us, clearly envisioned by the pattern of the statute.

That administrative investigations may be and are often intended to serve as preliminaries to adversary proceedings of a judicial character to which the United States is a party is more or less of a commonplace, where such investigations will serve the public interest. See, e.g., Internal Revenue Code §7602 (1954); Atomic Energy Act, 42 U. S. C. A. §1812(a) (3); Civil Aeronautics Act, 49 U. S. C. A. §§ 642, 644(b), 459, 487; Securities Act, 15 U. S. C. A. §77s (a); Public Utility Holding Company Act, 15 U. S. C. A. § 79(r). As stated by Mr. Justice Jackson, writing for the Supreme Court, in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642-3 (1950):

> "The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that,

cates that its several parts are closely articulated into a comprehensive, smoothly functioning whole. After the filing of a petition for naturalization, all examinations and investigations by the officers and employees of the Service designated for that purpose by the Attorney General are conducted pursuant to powers defined and described in Section 335(b). The statute and the subject matter of immigration and naturalization are sui generis; and the exercise of these administrative and judicial investigatory powers side by side and pari passu is, it seems to us, clearly envisioned by the pattern of the statute.

That administrative investigations may be and are often intended to serve as preliminaries to adversary proceedings of a judicial character to which the United States is a party is more or less of a commonplace, where such investigations will serve the public interest. See, e.g., Internal Revenue Code §7602 (1954); Atomic Energy Act, 42 U. S. C. A. §1812(a) (3); Civil Aeronautics Act, 49 U. S. C. A. §§ 642, 644(b), 459, 487; Securities Act, 15 U. S. C. A. §78 (u); Public Utility Holding Company Act, 15 U. S. C. A. § 79(r). As stated by Mr. Justice Jackson, writing for the Supreme Court, in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642-3 (1950):

> "The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that,

which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law."

In view of the broad general language of Section 235(a) it does not seem to us surprising that no reference is made in Section 340 to the administrative investigatory powers which the Service now seeks to exercise. Nor do we find anything improperly included in or omitted from the Regulations, now so clearly integrated with the various sections of the Act. There is no point in merely repeating in the Regulations something already apparent on the face of the statute. Naturally, the Regulations affecting "Procedural and Other Non-substantive Provisions" of Section 235(a) relate to the sort of detailed run-of-the-mill practical problems arising from day to day in connection with immigration and inspections.

Moreover, Regulation § 340.11 [8] seems to tie in perfect-

[8] § 340.11 *Investigation and report.* Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Com-

ly with the interpretation we have given of Section 235(a) as conferring new and broad administrative investigatory powers upon immigration officers delegated by the Attorney General to exercise these powers. Thus "whenever it appears that any grant of naturalization may have been procured by concealment or wilful misrepresentation, the facts shall be reported to the district director having jurisdiction * *." Moreover, where the commission of a crime is indicated — a "violation of section 1425 of Title 18 of the United States Code" — the facts may be presented by the district director "to the appropriate United States Attorney for possible criminal prosecution;" but "[I]f the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted." The "investigation to be made" must of necessity be administrative in character; and it is noteworthy that additional protection to the naturalized citizen is afforded by the "report" and "recommendation" to the Commissioner, who in turn, but only after he decides, in the exercise of his judgment and discretion in the premises, that a civil action in equity for denaturalization should be brought, will forward the dossier or a summary thereof to the United States "district attorneys," who "upon affidavit showing good

[Continued]

missioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United Sttaes Attorney for possible criminal prosecution.

cause" are, according to the provisions of Section 340, to "institute proceedings" in the appropriate state or federal court to effect revocation of the certificate of naturalization. The articulation between the various sections of the Act and the Regulations is compact and in no way ambiguous or repetitious. No effort is wasted on unnecessary commentary; and provision is made for the very sort of administrative orderliness that it is the purpose of the Regulations to serve. Again and again is the administrative investigatory power of the Service recognized, and in the very matter of denaturalization proceedings under Section 340.

Broad policy considerations, plainly to be seen on the face of the Immigration and Naturalization Act of 1952, are equally at variance with the narrow interpretation of Section 235(a) which is reflected in the orders appealed from.

Even as early as 1903 the Congress framed immigration laws which took cognizance of subversives. (Act of March 3, 1903, c. 1012; 32 Stat. 1213). But in recent years infiltration, by the hirelings and conspiratorial agents of Communism, and by the propagandists and enthusiasts of that and other alien ideologies equally repugnant to our free institutions, has become more and more loathsome and menacing. It must not be forgotten that the Subversive Activities Control Act of 1950 (Act of September 23, 1950, c. 1024, Title 1, § 1-32; 64 Stat. 987) amended numerous sections of various immigration and naturalization laws, and most of these amendments have been incorporated into the 1952 Act with which we are now concerned. The findings relative to totalitarian dictatorship and the world

communist movement which are found in Section 2 of the Subversive Activities Control Act of 1950 have a direct bearing on the Congressional intent behind Section 235(a) of the 1952 Act; and one of the findings is especiallly significant. Section 2(14) of the 1950 Act states:

> "One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society."

Suffice it to say that there is abundant internal evidence in the Act of 1952, and those laws which have been integrated into its warp and woof, to indicate that the Congress in bringing together for the first time in our history all the laws regulating immigration and naturalization, into one extensive compilation, was particularly sensitive to the need for prompt and effective dealing with subversives. Again and again we find a steady strengthening of the investigatory powers of the Service,[4] and, where experience prior to the passage of the Act of 1952 disclosed the need therefor, holes in previously existing laws were plugged and gaps were filled.[5] This was done so that the facts

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[4] E. g., Secs. 105, 235, 287, 335, 8 U. S. C. A. Secs. 1105, 1225, 1357, 1446.

[5] E. g., Sec. 101, 8 U. S. C. A. Sec. 1101, clarified the definition of "entry" which had given the courts considerable difficulty in previous cases. See *Delgadillo v. Carmichael*, 332 U. S. 388 (1947) and *Di Pasquale v. Karnuth*, 158 F. 2d 878 (C. A. 2, 1947); Sec. 318, 8 U. S. C. A. Sec. 1429, eliminated the anomolous situation confronting the court in *U. S. ex rel Walther v. District Director*, 175 F. 2d 693 (C. A. 2, 1949). See *U. S. ex rel Jankowski v. Shaughnessy*, 186 F. 2d 580 (C. A. 2, 1951); Sec. 243 (c), 8 U. S. C. A. Sec. 1253 (c), specifically corrected the prob-

might be promptly ascertained and appropriate and expeditious action taken, not only by way of exclusion or deportation, but in the general administration and enforcement of the Act, applicable to the whole subject of immigration and naturalization as set forth therein.

This does not mean that the Falcones and Okido are charged with or even suspected of subversion. Nothing in these records now before us indicates that any of the respondents has ever been engaged in or had any knowledge of subversive activities of any kind. Nor are they to be criticized for challenging the authority of the immigration officers to issue the subpoenas. They had a perfect right to do that. Furthermore, in so far as concerns the interpretation of Section 235(a), we may assume that they may well be exonerated at the conclusion of the investigations. But the answer to the question before us does not depend upon what may or may not be revealed in a particular case; and it is plain that the exercise of these increased administrative investigatory powers by immigration officers in ferreting out concealments and frauds connected with naturalization proceedings will put the government in a position to deal more effectively with subversives.

Accordingly, we conclude that the increased administrative investigatory powers given by the terms of Section 235(a) of the 1952 Act were intended to relate to the enforcement of the Act as a whole, as stated therein, includ-

[CONTINUED]

lem confronting the courts under the prior provision in *U. S. v. Prince Line Ltd.*, 189 F. 2d 386 (C. A. 2, 1951); Sec. 274, 8 U. S. C. A. Sec. 1324, cures the omission, from the earlier statute, of penalty provisions for certain of the offenses described therein. The earlier defect was pointed out in *U. S. v. Evans*, 333 U. S. 483 (1948).

ing the ascertainment of such facts as may tend to support a petition for denaturalization. The fact that deportation may follow denaturalization merely emphasizes further the reasonableness of the enlargement of powers of immigration officers which we find in Section 235(a).

We share the solicitude of the two able district judges below, that naturalized citizens be not harassed by subpoenas issued pursuant to legislation of doubtful applicability nor deprived of "the security of judicial over administrative actions" but we think the statute is free from ambiguity. Nor does it seem to us that the denaturalization suit, which may in some cases follow the administrative investigation provided for in Section 235(a), will lack any of the safeguards and protections which are commonly associated with judicial proceedings. Respondents will still have their sixty days to answer the petitions, should they be filed, together with the protection afforded by the Federal Rules of Civil Procedure; and they may still urge any constitutional objections to questions addressed to them by the immigration officers in the course of the investigations.

The orders appealed from are reversed; and the respective District Courts directed to proceed in accordance with this opinion.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,347

UNITED STATES
v.
ABRAHAM MINKER,
Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 14, 1954
Before GOODRICH, KALODNER and HASTIE, *Circuit Judges*

OPINION OF THE COURT
(Filed December 1, 1954)

By HASTIE, *Circuit Judge*.

The contempt conviction which we review on this appeal resulted from the refusal of the appellant, Abraham Minker, a naturalized citizen who has resided in this country for more than forty years, to honor a subpoena issued by the District Director of Immigration and Naturalization requiring appellant to appear and testify as a witness in an administrative proceeding entitled "In re Abraham Minker".

From the beginning it has been agreed that this administrative proceeding was the opening inquiry in a course of official action directed toward the denaturalization of

Minker.[1] If probable cause for denaturalization should be found in this administrative proceeding, the appropriate officer of the Immigration and Naturalization Service would then submit his certificate and affidavit of probable cause to a United State Attorney. In normal course, the United States Attorney, armed with that affidavit and such evidence as the immigration authorities had assembled in reaching the administrative decision, would proceed, as authorized by statute, to institute a formal court action against Minker seeking a decree depriving him of citizenship.

The question before us is whether the immigration officer had authority to subpoena Minker to testify in the administrative first stage of official action toward his denaturalization. The government says that Section 235(a) of the Immigration and Nationality Act of 1952[2] give im-

[1] After the issuance of the subpoena, a letter was sent appellant advising him that his attendance was commanded in order that he might give testimony "in connection with and relating to the possible institution of proceedings seeking the revocation of your naturalization in accordance with Section 340 of the Immigration and Nationality Act of 1952."

[2] 66 Stat. 198, 8 U. S. C. § 1225 (a). The subsection reads as follows:

"... The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is

migration officers such subpoena power. That section provides that " . . . any immigration officer . . . shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers . . . ." It also makes this power applicable to the obtaining of testimony "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service . . ." Certainly, the proceedings "In re Minker" was such a matter. The doubtful question is whether Abraham Minker, in his relation to "In re Minker" is a "witness" within the meaning of Section 235(a).

In our ordinary use and understanding of language, witnesses and parties are different categories of participants in an administrative or judicial inquiry. Yet, those so interested in a proceeding as to be parties do at times give evidence as witnesses. Therefore, it may be unclear on the face of a legislative enactment concerning witnesses whether parties are included. This ambiguity has appeared and has proved troublesome in cases arising under

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[2] [CONTINUED]
material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

statutes which authorize the taking of depositions of "witnesses". It has frequently been held that parties and other interested persons are not covered by such statutes. *In re Denning*, 1948, 44 Del. 470, 61 A.2d 657; *Hamilton Co. v. Goring*, 1940, 65 R.I. 459, 16 A.2d 334; *Hubbard v. Haynes*, 1949, 189 Tenn. 335, 225 S.W.2d 252. We cite these cases principally for their teaching that "witness" is likely to be an ambiguous word, the meaning of which "is to be determined in each case by the attendant circumstances and context, and that there is no safe general rule that can be applied universally". See *Hubbard v. Haynes*, *supra*, at 338, 225 S.W.2d at 253. Approaching this case that way we find three considerations which lead us to the conclusion that "witnesses" as used in Section 235(a) should not be construed to include such a party as appellant.

In 1952 Congress rewrote the entire body of our statutory immigration and nationality laws. Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C., 1952 ed., ch. 12. The provision we now are construing is new language in the 1952 Act. The section in which it appears is only one of several scattered throughout the Act in which some provision is made concerning witnesses. Therefore, it is significant that in several such sections where Congress wished to make a provision as to witnesses applicable to parties in interest, it said so. In prescribing naturalization procedure, Congress granted the subpoena power in these terms:

> "The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization . . . . For such purposes any such employee . . . is authorized . . . to require by subpoena the attendance and testimony of wit-

nesses, including petitioner. . . ." 8 U.S.C., 1952 ed. § 335(b).

Similar precision appears in the regulation of deportation procedure:

> "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses. . . ." 8 U.S.C., 1952 ed., § 242(b).

Almost identical language appears in connection with the exclusion of aliens:

> "A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses." 8 U.S.C., 1952 ed., § 236. (a).

Again, it is provided:

> "The Attorney General shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition, concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, including the petitioner, . . ." 8 U.S.C., 1952 ed., § 336 (d).

In these circumstances the failure to make any equivalent amplification of the witness category in Section 235(a) is some indication that none was intended.

The second consideration is predicated on the fact that in Section 340 of the new immigration statute, Congress

has been careful to outline a judicial procedure which must be followed to accomplish denaturalization. 8 U.S.C., 1952 ed., §1451. Specific provision is made for an adversary proceeding to be instituted by a United States Attorney in an appropriate court. Grounds for denaturalization must be stated in a formal charge and this document must be served upon the defendant, who shall have 60 days in which to answer. A trial follows. Congress must have believed that the administration of justice in these serious cases would be facilitated by safeguards inherent in such procedure. But as one district judge has pointed out in a case indistinguishable from ours, "If the subpoenas here were allowed to stand, the judicial procedure for the revocation of naturalization certificates would be pre-empted by administrative action, and the provisions for personal notice, sixty-day time period to answer in section 340(b) of the Act would be empty words." *Application of Barnes*, N.D. N.Y. 1953, 116 F. Supp. 464, 469. Accord, *In re Oddo*, S.D. N.Y. 1953, 117 F. Supp. 323. Of course Congress may have intended to minimize the safeguards afforded by Section 340 by compelling the citizen to be a witness against himself in an administrative pretrail. But we think such intention sufficiently unlikely to make a court reluctant to find it by an unnecessarily broad interpretation of the subpoena power conferred by Section 235(a).

Finally, we think the character of denaturalization is such that in choosing between reasonable alternative constructions of statutory language, a court should incline toward the construction favorable to the person whose status is put in jeopardy. The strict construction of criminal statutes is an accepted policy of our jurisprudence designed to protect those who live under our law from possible injus-

tice. Technically, we are not administering the criminal law in this case. But we are concerned with the administration of a sanction which in effect is gravely penal. A fine or imprisonment is the normal criminal penalty. But loss of citizenship is a far graver penalty than most fines and many prison sentences. The Supreme Court has recognized this by requiring a strictness of proof in denaturalization cases which approximates that imposed in criminal cases. *Schneiderman v. United States*, 1943, 320 U. S. 118; *Baumgartner v. United States*, 1944, 322 U. S. 665. And a court of appeals has recently held that the rule of strict construction of penal statutes applies to legislation of "punitive impact" very much like denaturalization. *Yaugiaang v. Boyd*, 9 Cir. 1953, 205 F. 2d 553. We think this is sound and salutary doctrine. Its application here is the third factor which leads us to the construction urged by appellant.

We conclude that a citizen confronted with an administrative proceeding which poses a challenge to his right to retain citizenship is not to be regarded as a "witness" within the meaning of Section 353(a) or required under that section to appear and testify against himself. We note that the learned district judge in this case was careful to say that he was not deciding what the appellant might be required to testify but merely that, in response to the subpoena, he must submit himself as a witness. However, we think the statute does not contemplate that he must be a witness at all in an administrative inquiry instituted with a view to depriving him of citizeship. That much we decide, but no more. We neither consider nor intimate any opinion upon any of the countless other situations in which immigration officers may undertake to require by sub-

poena the appearance and testimony of interested persons in administrative inquiries. E.g., the problem presented, under a statute now repealed, in *Loufakis v. United States*, 3 Cir. 1936, 81 F.2d 956.

The judgment will be reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix C.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

In the Matter
of
Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for process to enforce subpoena as to SALVATORE FALCONE
Civil No. 1494

In the Matter
of
Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for process to enforce subpoena as to JOSEPH FALCONE
Civil No. 1495

Appearances:

ANTHONY F. CAFFREY
United States Attorney
Northern District of New York
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ANTHONY S. FALCONE, Esq.
Attorney for Respondents
1213 First National Bank Building
Utica, New York

HERMAN I. BRANSE, Esq.
Immigration & Naturalization Service
On the Brief

Before: HON. J. T. FOLEY—D. J.

MEMORANDUM

These applications present a novel and important problem concerning administrative and investigative functions under the provisions of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 USCA 1101. The two separate applications are similar enough in factual background, nature and purpose to be discussed as one.

Joseph and Salvatore Falcone are naturalized citizens of the United States. Joseph Falcone assumed such status by an order of the Supreme Court of the State of New York, Oneida County, on February 18, 1925, and Salvatore Falcone was duly admitted to citizenship by order of the same court, dated July 21, 1925. The Falcones came into this country on December 8, 1907, with their parents, who are now deceased, and at the time of entry Joseph was four years of age and Salvatore was sixteen.

A short time previous to the issuance of the subpenas here in question, each respondent received letters from immigration officials requesting that they appear at certain times and places for interview. The details of such interviews are not important except to note that Salvatore was more cooperative in the interview procedure than Joseph. He was asked to explain the reason for the use of the name Projetto by his parents when they entered the country and he answered he had no explanation because his father and mother were dead and he had always

used and was known by the name Falcone. Joseph would not answer any questions when informed by the immigration officer that the reason for the interview would not be stated.

The result of this attitude on the part of the Falcones was the service upon them of separate subpenas, one signed by an officer-in-charge and the other by an acting officer-in-charge of the Immigration and Naturalization Service. Each subpena comanded them to appear on certain dates at the Federal Building in Syracuse, New York, to give testimony and make a statement before an officer of the service at the designated time and place, and further commanded each to produce and bring with them evidence of birth and original entry into the United States and naturalization certificate. Each subpoena was entitled only "In re Salvatore Falcone" and "In re Joseph Falcone;" each subpena specifically stated that it was pursuant to the provisions of section 235 (a) of the Immigration and Nationality Act. The respondents appeared pursuant to the subpenas and both refused to testify under oath, claiming that the subpenas were invalidly issued as against them because they were naturalized citizens and not aliens. Each produced for inspection their birth certificates and certificate of naturalization. Upon the return of the order to show cause, the respondents appeared specially, challenging the power to issue subpenas as against them under the terms of section 235 (a) of the Act. At the hearing upon such return, the official records of the Oneida County Clerk were subpenaed into court by the respondents and disclosed that the certificate of arrival or original entry demanded in each subpena are matters of official record as part of the naturalization

proceedings and available to the immigration service, although not open, as I understand it, to public inspection.

The first contention of the immigration service in these applications is that the subpena power used against these naturalized citizens is authorized and delegated by the Congress in this particular part of the terms of 235 (a) of the Act (8 USCA 1225 (a)):

> "The Attorney General and any immigration officer, including special inquiry officers shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers and documents relating to the privilege of any person to enter, reenter, reside in, or pass through, the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service to that end may invoke the aid of any court of the United States."

The subsection concludes with the conferring of jurisdiction upon the district court to order compliance with such subpena.[1]

The second contention in behalf of the application is

[1] "Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such person to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

that despite the express confinement of the subpena as "pursuant to the provisions of section 235 (a) of the Act," the power to issue subpenas here is implicitly authorized and granted by the terms of 287 (b) of the Act (8 USCA 1357 (b)) relating to powers of immigration officers and employees.[2]

Further, inasmuch as it is now frankly stated that the legality of the naturalization of the Falcones is under investigation, the subpena power is necessary in the investigation and report as to the institution of revocation proceedings in accordance with the regulations promulgated by the attorney general in the administration and enforcement of the Act in that respect.[3]

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[2] "Sec. 287 (b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code."

[3] Sec. 340.1 Investigation and report. Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by willful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Com-

These contentions create a question of statutory construction. There is no judicial authority to my knowledge directly in point and the analysis of the intent of the Congress is made difficult by the immensity of the Act itself. The importance to the administration and enforcement of the Act is evident because it would ease the burden of investigations in such situations as here, but such reason of expediency cannot prevail if the subpena power exercised is in excess of the statutory grant. The authority of Congress to delegate the subpena power to administrative agencies is clearly established, even to the extent that it may delegate effective power to investigate violations of its own laws. However, the subpena power must remain within the bounds of the legislative grant, not overreach the authority granted by Congress, and investigatory matters should be conferred in express and explicit terms for that purpose. Harriman v. ICC, 211 U. S. 407; Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186, 201, 217; National Labor Board v. Anchor Rome Mills, 107 F (2d) 447, 449. In my own judgment, subpenas should not issue upon ill or miss legal grounds.

In support of the first contention outlined, the government emphasizes the changes in section 235 (a) of the Act from the previous provision governing such situations as contained in section 16 of the Immigration Act of 1917

[CONTINUED]

missioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for a possible criminal prosecution."

(8 USCA 152).* The word "alien" in the old statute was changed to "person" and a broad clause in relation to the power to subpena was added, "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." It was judicially settled under the old provision (8 USCA 152) that the subpena power could be exercised against aliens in either deportation or exclusion proceedings. Loufekis v. U. S. 84 F (2d) 968; Graham v. U. S., 99 F (2d) 746, reversing on other grounds U. S. vs. Parson, 22 F. Supp. 149; In re Yaris, 109 F. Supp. 921, 922. Now the government says in its brief that this change and the addition in terminology in section 235 (a) are most significant and evidence a congressional intent to enlarge the subpena power to enable immigration officers to question every person, alien or citizen, in connection with the investigation of any matter under any section of the Immigration and Nationality Act. However, it is only necessary for me to decide whether these naturalized citizens under investigation as the target for possible revocation proceedings, and ultimately possible deportation proceedings, are subject to subpena under this portion of the Act. I do not think so for several reasons.

Section 235 in the body of the Act is entitled "Inspection by Immigration officers." (66 Stat. 198). In the Title of Contents it is listed under Chapter 4, "Provisions

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* * * * Any district director of immigration and naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States * * * *

relating to Entry and Exclusion" (66 Stat. 163). In the analysis of the bill, contained in House Report No. 1365 (U. S. Code Service, 1952, pages 1709-1710), the discussion of section 235 is under the heading "Entry, Exclusion and Deportation of Aliens" (Ch. 4 and Sec. 287). Such analysis, although it pertains to other provisions of subsection 235 (a), outside that portion relied upon here by the government, gives some enlightenment as to the congressional intent of section 235:

> "* * * In conjunction with their inspection of aliens, the bill authorizes the immigration officers to board and search vessels, aircraft, railway cars or any other conveyance or vehicle in which they believe aliens are being brought into the United States. The immigration officers are empowered to administer oaths, take evidence and make a record, if necessary, concerning the enforcement of the bill with reference to the privilege of any alien to enter, pass through or reside in the United States. Any person coming to the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain, whether or not he intends to remain permanently, whether if an alien, he intends to become a citizen, and such other information as will aid the immigration officers in determining whether the person is a national of the United States or an alien, and, if the latter, whether he is subject to exclusion under any of the provisions of the bill. It is not intended by this provision to subject the ultimate question of the admissibility or harassment of citizens returning to the United States, but it is to be used by the immigration officers whenever there is reason to believe that a citizen is violating or about to violate the law and is about to

becomes expatriated. Immigration officers are also granted the power to subpoena the attendance and testimony of witnesses, and the production of books, papers, and documents in aid of the enforcement of the provisions of the bill. An alien who does not appear, to the examining immigration officer, to be admissible, clearly and beyond a reasonable doubt, shall be detained for further inquiry by a special inquiry officer. * * *"

"* * * Section 287 of chapter 8 further specifies powers of immigration officers and employees of the Immigration and Naturalization Service. * * *"

As I read this background and the section as a whole, I cannot reasonably discern an intent that would allow subpoena power over naturalized citizens for the purpose of investigation to ascertain good cause for the institution of revocation proceedings. The Limitation of this administrative subpoena power, in my judgment, must be kept within the confines of the provisions as stated and restricted to such purpose, and there is not the slightest indication in the legislative background nor the terms of the provisions that it may be used for the investigative purpose here sought against a naturalized citizen. One judicial discussion of section 235(a), together with other related sections, indicates generally that issues of law under such section concerns only aliens and not citizens of the United States by birth or naturalization. Int. Longshoremen's Union v. Boyd, 111 F. Supp. 802. In construing these provisions I have also kept in mind that it necessarily would have punitive impact upon an important right now held by the respondents, the revocation of which might ultimately result in deportation. Such punitive impact of

a statute calls for strict construction of the terms. Mangaoang v. Boyd, 205 F.(2d) 553, cert. denied November 9, 1953, 22 L.W. 3121.

The most important reason for my conclusion as to the invalidity of the subpoenas comes from a reading of the Act as a whole, which the government recommends in support of its contention. A specific, detailed and exact judicial procedure is set forth in section 340 for the revocation of naturalization certificates when they were procured by concealment of a material fact or by willful misrepresentation. The pertinent part of section 340(a) is set forth below.[5] The most striking part of this procedure, which is old in the law, is contained in section 340(b).[6]

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[5] "Sec. 340 (a). It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. * * *" (8 USCA 1451).

[6] "Sec. 340 (b). The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of

In discussing the judicial procedure as outlined in section 15 of the Act of 1906, similar to the one we have today, Judge VanDevanter stated: "* * * the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors were never lawfully entitled." (Luria v. U. S. (1913) 231 U. S. 9, 24). A citizen is entitled to have his status determined by a judicial tribunal and have the security of judicial over administrative action. Bilokumsky v. Tod, 263 U. S. 149, 152; Ng Fung Ho v. White, 259 U. S. 276.

If the subpoenas here were allowed to stand, the judicial procedure for the revocation of naturalization certificates would be pre-empted by administrative action, and the provisions for personal notice, sixty-day time period to answer in section 340 (b) of the Act would be empty words. The method of challenge to fraudulent naturalization is

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the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

plainly prescribed and any examination of the party against whom it is directed should be in accord with the judicial process. The investigative power of the Service is an important one, and I carefully avoid any undue limitation or hampering of such power. I agree that naturalization is a privilege rather than a right and an alien who seeks this privilege must conform strictly with the requirements established by statute. U. S. v. Ness, 245 U. S. 319.

It must be equally kept in mind that under our constitution a naturalized citizen stands on equal footings with the native citizen in all respects, save that of eligibility to the Presidency. Osborn v. Bank of U. S., 22 U.S. (9 Wheat.) 739; Boyd v. Thayer, 143 U.S. 135; Luria v. U. S., 231 U.S. 9.

My outlined reasoning in relation to section 340 of the Act is sufficient answer to the contentions that the subpoena power should in this particular situation be implied as concomitant to the provisions of section 278(b) of the Act and 8 CFR 340.11. The issuance and form of subpoenas in proceedings pending before immigration officials are set forth in 8 CFR 287.4 (a) (b).

Each application to enforce the subpoena involved is denied and dismissed.

Dated: Albany, New York, November 20, 1953.

Appendix D.

In re ODDO
United States District Court,
S. D. New York.
Dec. 30, 1953.

WEINFELD, District Judge.

"Respondent, a naturalized citizen, moves to vacate an ex parte order issued by the United States District Court pursuant to Sec. 235(a) of the Immigration and Naturalization Act, 8 U.S.C.A. Sec. 1225(a), directing him to appear and give testimony with respect to the legality of his naturalization "and other pertinent matters." The order was obtained on the basis of an affidavit of an attorney in the office of the District Counsel, Immigration and Naturalization Service, Department of Justice, who alleged that the respondent was the subject of an investigation concerning the legality of his naturalization.

"The respondent's contention is that the subpoena power granted to the Attorney General and the immigration officers under Sec. 235(a) of the Act is limited to cases involving the entry, exclusion and deportation of aliens,[1] and does not include the right to subpoena a naturalized citizen where the ultimate objective is revocation of his citizenship.

"Two recent District Court decisions dealing with the precise issue here presented have reached contrary results. Application of Barnes (In the Matter of Falcone), D.C.N.D.N.Y., 116 F. Supp. 464; In the Matter of Minker, D.C.E.D.

[1] Cf Loufakis v. United States, 3 Cir., 81 F. 2d 966; In re Yaris, D. C. S. D. N. Y., 109 F. Supp. 931.

Pa., 118 F. Supp. 264.) The question is close; but independently I arrived at the conclusion—the one reached by Judge Foley in the Falcone case—that under Sec. 235(a) of the Act the Immigration Service officials have no power to issue a subpoena against a citizen preliminary to the commencement of the denaturalization proceedings. In so holding, I fully agree with the reasoning of Judge Foley.

"I add but two points. While Sec. 235(a) in broad terms states that the Attorney General and "any immigration officers" have power to subpoena witnesses "concerning any matter which is material and relevant to the enforcement of this Act * * *," the section appears in Chapter 4 of Title II of the Act, entitled "Provisions Relating to Entry and Exclusion". On the other hand, Sec. 340,[2] which governs revocation of naturalization procedure, is contained in Title III of the Act. This title is headed "Nationality and Naturalization". Section 335(b) of Title III, 8 U.S.C.A. Sec. 1446(b), grant "employees of the [Immigration and Naturalization] Service" who are designated by the Attorney General the power to subpoena witnesses in pre-naturalization procedures. By definition "immigration officer" means any "employee or class of employees of the Service".[3] Thus, if the subpoena power in Title II, Sec. 235(a), were intended to extend to and to apply to all sections of the Act, as the government contends, then Sec. 335(b) of Title III is duplicitous and serves no function. "The Act is not to be construed so as to make a provision meaningless."[4]

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[2] 8 U.S.C.A. Sec. 1451.

[3] Sec. 101 (a) (18) 8 U.S.C.A. Sec. 1101 (a) (18).

[4] Platt v. Union Pacific R. Co., 99 U.S. 48, 49, 25 L. Ed. 424;

"One further point. Suits to revoke citizenship are to be instituted, according to the express mandate of Sec. 349 of the Act, by the United States Attorney for the district wherein the naturalized citizen resides. Revocation suits are actions in equity.[5] As a litigant in such suits, the government is bound by the same rules which apply to all other litigants, except as the law may otherwise expressly provide. If Congress had intended to grant the government as an adversary greater rights than those extended to other civil litigants, purpose would have been clearly indicated in the section dealing with denaturalization proceedings, particularly so, since invariably it is preliminary to a deportation proceeding.

"Nowhere in the statute, at least my attention has not been called to any such provision, is power granted to the Immigration and Naturalization Service to participate in the function imposed upon the United States Attorney to

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[1] [Continued]
Hurley v. United States, 4 Cir., 192 F. 2d 297, 300;
Lawrence Warehouse Co. v. Defense Suppliers Corp., 9 Cir., 168 F. 2d 199, 202, vacated on other grounds, 336 U. S. 631, 69 S. Ct. 762, 93 L. Ed. 931;
United States ex rel. Lee Ah Youw v. Shaughnessy, D. C. S. N. Y., 102 F. Supp. 799;
Parcell v. United States, D. C. D. W. Va., 104 F. Supp. 110, 116.

[5] Luria v. United States, 231 U. S. 9, 27-28, 34 S. Ct. 10, 58 L. Ed. 101;
United States v. Kusche, D. C. S. D. Cal., 56 F. Supp. 201, 225;
cf. Schneiderman v. United States, 320 U. S. 118, 160, 63 S. Ct. 1333, 87 L. Ed. 1796;
Baumgartner v. United States, 322 U. S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525.

prosecute revocation suits. It is true that a regulation[6] has been promulgated by the Attorney General authorizing the Immigration and Naturalization Service to conduct investigations on behalf of the United States Attorney, but this regulation may not be used to extend a subpoena power to the Service which the statute itself does not grant to the United States Attorney."

"Consequently, for these and the persuasive reasons adverted to by Judge Foley, I think that the scope of Section 335(a) is to be confined to the title of the Act in which it appears. Since no subpoena power is granted to the Attorney General or Immigration Service officials in connection with revocation of naturalization proceedings in Title III, respondent's motion to vacate the ex parte order is granted.

"This disposition makes it necessary to consider the other objections urged by the respondent.

"Settle order on notice."

---

[6] 8 CFR Sec. 340.11.

Appendix E-1.

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January one thousand nine hundred and fifty-five.

Present: HON. HARRIE B. CHASE,
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges.

In the Matter
of
the application of Harold E. Barnes, Officer in charge of Immigration & Naturalization Service for Process to enforce Subpoena as to Salvatore Falcone.

(20)

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. DANIEL FUSARO
Clerk.

Filed Jan. 10, 1955.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. DANIEL FUSARO
Clerk.

Filed Jan. 10, 1955.

Appendix E-2.

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January one thousand nine hundred and fifty-five.

Present: HON. HARRIE B. CHASE,
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges.

In the Matter
of
the application of Harold E. Barnes, Officer in charge of Immigration & Naturalization Service for Process to enforce Subpoena as to Joseph Falcone.
(21)

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

Appendix F.

STATUTES INVOLVED

Section 235 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C., Section 1225) appears under Title II of said act, entitled "Immigration" under Chapter 4, subtitled "Provisions Relating to Entry and Exclusion" and states:

"Inspection By Immigration Officers

"Sec. 235. (a) The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States, shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any

person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the

court may be punished by the court as a contempt thereof."

Section 287 (b) of the Act, (8 U. S. C. Section 1357 (b)), appears under Title II, entitled "Immigration", under Chapter 9—subtitled "Miscellaneous" and states:

"POWERS OF IMMIGRATION OFFICERS AND EMPLOYEES

"SEC. 287. (b) Any officer or employee of the service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to whom such oath has been administered under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code."

Section 335 (a) and (b) of the Act, (8 U. S. C. Section 1446), appears under Title III, entitled "Nationality and Naturalization" under Chapter 2, subtitled "Nationality through Naturalization" and states:

"INVESTIGATION OF PETITIONERS; PRELIMINARY EXAMINATIONS ON PETITIONS

"SEC. 335. (a) At any time prior to the holding of the final hearing on a petition for naturalization provided for by section 336 (a), an employee of the Service

vice, or of the United States designated by the Attorney General, shall conduct a personal investigation of the person petitioning for naturalization in the vicinity or vicinities in which such person has been employed or has engaged in business or work for at least five years immediately preceding the filing of his petition for naturalization. The Attorney General may, in his discretion, waive a personal investigation in an individual case or in such cases or classes as may be designated by him.

"Conduct of Examinations

"(b) The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make recommendations thereon to such court. For such purposes any such employee so designated is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to administer oaths, including the oath of the petitioner for naturalization and the oaths of petitioner's witnesses to the petition for naturalization, and to require by subpena the attendance and testimony of witnesses, including petitioner, before such employee so designated and the production of relevant books, papers, and documents, and to that end may invoke the aid of any court exercising naturalization jurisdiction as specified in section 310 of this title; and any such court may, in the event of neglect or refusal to respond to a subpoena issued by any such employee so designated or refusal to testify before such employee so designated issue an order requiring such person to appear before such employee

so designated, produce relevant books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. The record of the preliminary examination authorized by this subsection shall be admissible as evidence in any final hearing conducted by a naturalization court designated in section 310 of this title."

Section 340 of the Act (8 U. S. C., Section 1451), appears under Title III, entitled "Nationality and Naturalization" under Chapter 2, subtitled "Nationality and Naturalization" and states:

"REVOCATION OF NATURALIZATION

"SEC. 340 (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: Provided; That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any

proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

"Concealment of Material Fact"

"(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

Title 8—Code of Federal Regulation

Part 287 appears under "Rules and Regulations", Subchapter B entitled "Immigration Regulations" and states:

"Part 287—Field Officers' Powers and Duties

"Sec. 287.1 Definitions.

Sec. 287.2 Criminal violations; investigation and action.

"Sec. 287.3 Disposition of cases of aliens arrested without warrant.

"Sec. 287.4 Subpena—(a) Who may issue. Except as provided in Sec. 335.11 of this chapter, subpoena requiring the attendance of witnesses or the production of documentary evidence, or both, may be issued upon his own volition by a district director, officer in charge, or special inquiry officer in any proceeding pending before him, or upon application of an officer of the Service, or upon written application of the alien or other party affected. If an alien or other party affected by a proceeding before the Service requests that a witness be subpoenaed to testify or to produce books, papers or documents in such proceeding before the Service, he shall be required as a condition precedent to the issuance of the subpoena to state in writing that he expects to prove by such witness or the books, papers, or documents and to show affirmatively that the proposed evidence is relevant and material and that he has made diligent efforts without success to produce the same. Upon determining that a witness whose evidence is desired either by the Service officer, or the alien or other party affected will not appear and testify or produce documentary evidence unless commanded to do so and that the testimony and evidence of such witness is essential, the district director, officer in charge, or a special inquiry officer in any proceeding pending before him, shall issue a subpoena. If the witness is at a distance of

more than 100 miles from the place of hearing, the subpoena shall provide for the witness' appearance at the field office nearest to him to respond to oral or written interrogatories, unless the Service indicates that there is no objection to bringing the witness the distance required to enable him to testify in person at the hearing.

"(b) Form.

"(c) Service.

"(d) Invoking aid of court."

Part 335 appears under Subchapter C entitled "Nationality Regulations", subtitled "Preliminary Examinations On Petitions For Naturalization", and states:

"Sec. 335.11 Preliminary examination pursuant to section 335 (b) of the Immigration and Nationality Act.—(a) *When held.* Preliminary examinations shall be open to the public, and shall, where practicable, be held immediately after the petition for naturalization is filed with the clerk of the court unless, in the opinion of the district director or officer in charge, the interests of good administration would be better served by holding such examinations prior to the filing of the petition in the office of the clerk of the court, but in no event shall such examinations be held before the petition has been properly executed by the petitioner and his verifying witnesses.

"(b) *Conduct of examination.* Preliminary examinations shall be held before an employee of the Service, designated by the district director to conduct such proceedings and to make findings and recommendations thereon to the naturalization court, who shall be known as the "designated examiner." The peti-

tioner and his witnesses and the witnesses produced on behalf of the Government shall be present. The designated examiner shall, prior to the commencement of the examination, make known to the petitioner his official capacity and that of any other officer of the Service who may participate in the proceeding. The designated examiner shall have before him the entire record of the preliminary interrogation, including the petitioner's application to file a petition for naturalization (Form N400) and any other evidence or data that may be relevant or material to the inquiry. All testimony taken at the examination shall be under oath or affirmation administered by the designated examiner. The designated examiner may interrogate the petitioner and witnesses produced in behalf of the petitioner or the Government, and present evidence touching upon the petitioner's admissibility to citizenship. He shall regulate the course of the examination, rule upon applications for the issuance of subpoenas and issue such subpoenas in proper cases, grant or deny continuances, and rule on all objections to the introduction of evidence, which rulings shall be entered on the record. Evidence held by the designated examiner to be inadmissible shall nevertheless be received into the record subject to the ruling of the court. The petitioner and the Government shall have the right to present such oral or documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts. If the petitioner is not represented by an attorney or representative, the designated examiner shall assist the petitioner in the introduction of all evidence available in his behalf. All documen-

tary or written evidence shall be properly identified and introduced into the record as exhibits by number, unless read into the record."

Part 340 appears under Subchapter C entitled "Nationality Regulations", subtitled "Revocation of Naturalization", and states:

"Sec. 340.11 Investigation and report. Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution."

Appendix G.

UNITED STATES CODE
Congressional and Administrative News—Vol. 2
82nd Congress—Second Session—1952
House Report No. 1365—pgs. 1709-1710

IMMIGRATION AND NATIONALITY ACT
TITLE II — IMMIGRATION

"4. Entry, exclusion, and Deportation of Aliens (Ch. 4 and Sec. 287)

"A. Inspection

"The provision relating to the inspection of arriving aliens, contained in chapter 4 of the bill, follow the general pattern of the present law. Every alien arriving at a port of entry must be examined by an immigration officer before he may enter, and such officers are empowered to detain the aliens on board the arriving vessel or at the airport of arrival for observation if suspected of being afflicted with mental or physical defects and may order the temporary removal of the alien for examination and inspection. Medical examinations are to be made by at least one qualified medical officer of the United States Public Health Service or by a qualified civil surgeon.

"In conjunction with their inspection of aliens, the bill authorizes the immigration officers to board and search vessels, aircraft, railway cars, or any other conveyance or vehicle in which they believe aliens are being brought into the United States. The immigration officers are empowered to administer oaths, take evidence and make a record, if necessary, concerning the enforcement of the bill with reference to the privilege of any alien to enter, pass through

or re-side in the United States. Any person coming to the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain, whether or not he intends to remain permanently, whether, if an alien, he intends to become a citizen, and such other information as will aid the immigration officers in determining whether the person is a national of the United States or an alien, and, if the latter, whether he is subject to exclusion under any of the provisions of the bill. It is not intended by this provision to sanction the indiscriminate questioning or harrassment of citizens returning to the United States, but it is to be used by the immigration officers whenever there is reason to believe that a citizen is violating or about to violate the law and is about to become expatriated. Immigration officers are also granted the power to subpoena the attendance and testimony of witnesses, and the production of books, papers, and documents in aid of the enforcement of the provisions of the bill. An alien who does not appear, to the examining officer, to be admissible, clearly and beyond a reasonable doubt, shall be detained for further inquiry by a special inquiry officer.

"It is specifically provided in section 235(b) that an inquiry before a special inquiry officer is not required in the case of an alien crewman or a stowaway. Furthermore, in section 235(c), it is provided that if an examination before a special inquiry officer is not required in the case of an immigration officer or a special inquiry officer an alien appears to be excludable under paragraph (27); (28), or (29) section 212(a) as an alien whose entry would endanger the public safety or security of the United States or as an alien who is a member of one of the subversive classes

of excludables, no further inquiry by a special officer shall be conducted until the case is reported to the Attorney General together with any such written statement and accompanying information as the alien or his representative may desire to submit in connection therewith. In the latter type of case, the Attorney General may direct an inquiry or a further inquiry, as the case may be, or if he is satisfied that the alien is excludable on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the interests of the United States, he may, in his discretion, order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer.

"Section 287 of chapter 8 further specifies powers of immigration officers and employees of the Immigration and Naturalization Service. Amendments Nos. 20 and 21 are designed to make a very carefully considered distinction between powers which may be exercised without warrant and such a warrant will be required. * * *"

Appendix H.

UNITED STATES COURT OF APPEALS.
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 8th day of February, one thousand nine hundred and fifty-five.

Present: HON. HARRIE B. CHASE,
HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges.

In the Matter
of
The Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for process to enforce subpoena as to Salvatore Falcone.

In the Matter
of
The Application of Harold E. Barnes, Officer in Charge of Immigration and Naturalization Service, for process to enforce subpoena as to Joseph Falcone.

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

Filed Feb. 8, 1955.

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BRIEF ON MERITS

No. 47

IN THE

Supreme Court of the United States

October Term 1955

SALVATORE FALCONE and JOSEPH FALCONE,
Petitioners,

—*vs.*—

HAROLD E. BARNES, Officer in Charge of Immigration and Naturalization Service,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONERS

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HAROLD E. BARNES, Officer in Charge of Immigration and Naturalization Service,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the Court of Appeals (R. 40-54) is reported at 219 F. 2d 137.

Jurisdiction

The judgments of the Court of Appeals were entered on January 10, 1954 (R. 54-55). Orders denying petition for rehearing is dated February 8, 1955 (R. 55). Petition for writ of certiorari was filed on April 12, 1955 and was granted on May 16, 1955. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

Questions Presented

The fundamental questions presented are, viz:

1. Whether the power granted by Section 235 (a) of the Immigration and Nationality Act of 1952 (8 U. S. C. Section 1225) (McCarran-Walter Act), to an immigration officer "*to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act* * * *" has application to an investigation, the object of which is to discover evidence for use in an Equity proceeding not yet instituted pursuant to Section 340 of said Act (8 U. S. C. Section 1451), to effect the revocation and cancellation of the naturalization certificates of the Petitioners herein, who are residents of the United States. (Italics supplied).

2. Whether by the exercise of said subpoena power contained in Section 235 (a) of the Act aforesaid, the Petitioners herein can be compelled to give evidence against themselves which could be used against them in a subsequent proceeding instituted, pursuant to provisions

of Section 340 of the Act (8 U. S. C. Section 1451), to effect the revocation and cancellation of their naturalization certificates.

3. Whether the power to issue a subpoena granted by Section 235 (a) of Title II of the Act, entitled "Immigration", Chapter 4 subtitled "Provisions Relating to Entry and Exclusion", can be exercised in an exploratory investigation into matters which would or could ultimately lead to a judicial proceeding to denaturalize a citizen, which proceeding is provided for by Section 340 of Title III of the Act, entitled "Nationality and Naturalization".

4. Whether the word "witness" as used in Section 235 (a) of the Act, without any qualifications whatsoever, can be construed to mean or include a "party" so as to subject such party to the subpoena power set forth in said Section 235 (a) of the Act.

Statutes Involved

Sections 235, 287, 340, 335 (a) and (b) of the Immigration and Nationality Act of 1952; 66 Statute 163, 198-9, (McCarran-Walter Act); 8 U. S. C. Sections 1225, 1357, 1451, 1446; and Code of Federal Regulations, Title 8, Parts 235, 287, 335 and 340. They are printed in Appendix A., B., C., D. respectively herein. (pp. 44 to 83).

Title II entitled "Immigration, Chapter 4 subtitled "Provisions Relating to Entry and Exclusion" under Section 235 entitled "Inspection by Immigration Officers" provides as follows:

> "Sec. 235 (a) The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to,

or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any im-

migration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.".

Statement

Petitioners are brothers and emigrated to the United States from Italy on the steamship San Giovanna and entered the Port of New York on December 8, 1967 disembarking at Ellis Island with their father and mother, Antonio and Maria Falcone, also known as Antonio and Maria Projelto, both now deceased. Petitioners and their said parents were lawfully admitted into the United States from Ellis Island (R. 26, 38, Pet. Ex. 6). That Sal-

vatore Falcone was 16 years of age and that Joseph Falcone was 4 years of age at said time (R. 26).

Salvatore Falcone is a duly naturalized citizen of the United States by virtue of a certificate of naturalization bearing No. 212636 and dated July 21, 1925 issued by order of the Supreme Court of the State of New York signed by the Hon. Ernest I. Edgecomb, one of the Justices of the Supreme Court of the State of New York (Oneida County) (R. 26, 38, Pet. Ex. 6).

Joseph Falcone is also a duly naturalized citizen of the United States by virtue of a certificate of naturalization bearing No. 2118748 and dated February 18, 1925 issued by order of the Supreme Court of the State of New York signed by the Hon. Jerome L. Cheney, one of the Justices of the Supreme Court of the State of New York (Oneida County) (R. 26, 38, Pet. Ex. 6).

Salvatore Falcone is presently a resident of the City of Utica, Oneida County, New York, and maintains a business interest with his son in the City of Miami, Dade County, Florida.

That during the summer of 1952, officers of the Immigration Service of Miami, Florida, called at Petitioner's place of business for the purpose of an interview; that they were informed by Petitioner's son that he could be contacted at the home of his son, the attorney herein, at Utica, New York. Said officers at that time asked whether said Salvatore Falcone was an alien or a citizen and upon receiving the reply that he was a citizen, left a message that when he returned to Miami he was to call at the office of the Service and to then bring with him his

naturalization certificate. That in September of that year, Salvatore Falcone complied with said request.

That prior to the issuance of the subpoenas here in question, the Immigration Service by letters addressed to Salvatore Falcone at Miami, Florida and to Joseph Falcone at Utica, New York, respectively, requested each to appear before officers of the Service in their respective cities for the purpose of an interview. That no reason was given therefor except "for an interview in connection with an official matter." (R. 12, 14, 16). Petitioners appeared at the designated time and place. That Salvatore Falcone was asked to explain the reason why his family immigrated to the United States under the name of Projelto and he answered all questions (R. 16); that Joseph Falcone did not answer any questions as the hearing officer, Stanley W. Anderson, refused to divulge the reason for the interview. (R. 8).

That on June 18, 1953, Joseph Falcone was served with a subpoena issued by the Acting Officer in Charge of the Immigration Service of the Syracuse, New York District, to appear before the Immigration and Naturalization Service at the Federal Building in Syracuse, N. Y. on June 23, 1953, pursuant to section 235 (a) of the Immigration and Nationality Act (8 U. S. C. 1225) and to produce at said time his birth certificate, original entry into the United States, naturalization certificate, and further was commanded to make a statement before an officer of the Service (R. 5, 6). Said subpoena was served by Stanley W. Anderson, Investigator (General). No fee or mileage was tendered either before or after the special appearance. That said subpoena did not set forth a proceeding in which he was called upon to testify except "In Re: Joseph

Falcone", and did not set forth the information the Service sought to elicit from him, in addition to the production of the documents therein described, nor the purpose of the same.

That at the appointed time and place, Joseph Falcone appeared specially before Stanley W. Anderson, who also presided as the hearing officer, and respectfully objected to the power of the Acting Officer in Charge to issue said subpoena against him pursuant to section 235 (a) of the Act (8 U. S. C. 1225), on the ground that such power was granted to him only in cases involving aliens and not duly naturalized citizens of the United States. Nevertheless, he voluntarily exhibited his naturalization and birth certificates (R. 4).

That on June 30, 1953, Salvatore Falcone was served with a subpoena to appear before the Service at the Federal Building in Syracuse, New York on July 3, 1953, issued pursuant to section 235 (a) of the Act, by the Officer in Charge of the Immigration Service of the Syracuse District, and to produce his birth and naturalization certificates and original entry, and was further commanded to make a statement before an officer of the Service, without setting forth the nature of the information sought to be elicited from him or in what proceeding such testimony was required except "In re: Salvatore Falcone" (R. 20, 21, Pet. Ex. C.); said subpoena was served by Stanley W. Anderson, Investigator (General), the person who also presided at the hearing and was to act as the interrogator and who was to administer the oath (R. 21-24). That Salvatore Falcone appeared specially and objected to the power of the Service to issue said subpoena; brought into the hearing room his own court stenographer who took

down the proceedings and for the third time voluntarily exhibited his birth and naturalization certificates (R. 22). That no fee or mileage was tendered either before or after the special appearance.

That thereafter, Petitioners were served with orders to show cause returnable at the Federal District Court for the Northern District of New York at Albany, New York, why they should not be held in contempt for refusal to testify pursuant to such subpoenas, and they appeared specially, objected that the subpoenas issued under section 235 (a) of the Act were invalid as against the Petitioners as naturalized American citizens, and subpoenaed into Court the original naturalization records on file in the Oneida County Court House of the Supreme Court of the State of New York which records disclosed the original entry or certificate of arrival (as demanded in the subpoena), together with the Declarations of Intention, Petitions for Naturalization, Oaths, Affidavits, Testimony in Open Court, and the respective Orders signed by Justices of the Supreme Court of the State of New York duly admitting Petitioners to citizenship (R. 25, 37, 38; Pet. Ex. 6).

The Immigration Service contended before the District Court that section 235 (a) of the Act confers upon it power to issue subpoenas against any person, including naturalized citizens, and that such power is implicitly authorized and granted by the provisions of section 287 (b) of the Act (8 U. S. C. 1357 (b)), and that it is also authorized by the Code of Federal Regulations, promulgated by the Attorney General in Title 8, §§ 287.4, 335.11 and 340.11, and that the Service needs said testimony to de-

termine the advisability of instituting actions in Equity against Petitioners for a decree of denaturalization pursuant to section 340 of the Act (8 U. S. C. 1451). (Appdx. A., B., C. and D.):

The District Court rendered its decision in writing dismissing the application of the Service (R. 26-35) stating in substance that a reading of the entire section 235 and the analysis of the Congressional Intent as to section 235, as expressed in House Report No. 1365, U. S. Code Service, 1952, pages 1709-1710, (Appdx. F.) indicate that it was not intended by Congress to confer jurisdiction on the Service to issue subpoenas to naturalized citizens of the United States; also that a naturalized citizen is entitled to have his status determined by a judicial tribunal and have the security of judicial over administrative action; and that to allow the subpoena to stand, the provisions of section 340 of the Act (8 U. S. C. 1451) which prescribes the judicial procedure for revocation would be empty words, and the judicial procedure would be preempted by administative action.

That Appeals were taken from the District Court judgments to the Court of Appeals, Second Circuit. That on January 10, 1955, the said Court of Appeals in an opinion delivered by Circuit Judge Medina, reversed the District Court and construed section 235 (a) of the Act of 1952 by giving it a broadly liberal interpretation to effectuate, as the Court believed, the intent of Congress to extend the investigatory powers of the Service to ferret out communists and subversives (R. 39-54).

The Court below then continued (R. 53):

"This does not mean that the Falcones * * * are

charged with or even suspected of subversion. Nothing in these records now before us indicate that any of these respondents has ever been engaged in or has any knowledge of subversive activities of any kind."

Summary of Argument

A resident naturalized citizen is not amenable to a subpoena issued by an immigration officer empowered to issue subpoenas by Section 235 (a) of the Immigration and Nationality Act of June 27, 1952, to compel him to testify to facts relating to his naturalization. Such provision relates only to proceedings involving entry and exclusion and have no application to a resident citizen.

The Act of 1952 which is a revision and codification of all the immigration and naturalization laws theretofore passed, comprises four titles, and many chapters, sections and subsections. Each Title deals with a separate subject and in its several sections sets forth the procedure to be followed in the enforcement of its substantive law. For example: Title II deals exclusively with "Immigration" and its several Chapters deal with "Aliens", "Entry", "Exclusion" and "Deportation". Title III deals exclusively with "Nationality and Naturalization" and its several Chapters deal with "Nationality, Naturalization and Denaturalization."

Each of said Titles contains provisions granting certain immigration officers the right to interrogate, examine, cross-examine, and to subpoena.

Section 235 (a) of Title II in Chapter 4 dealing with entry and exclusion, grants the "* * * power to administer

oaths and to take and consider evidence of or from *any person touching the privilege of any alien or person he believes or suspects to be an alien* * * ***** and also the "* * * power to require by subpoena the attendance and testimony of *witnesses* * * ***.

Section 236 (a) of Title II in Chapter 4 dealing with entry and exclusion, grants the power to "* * * administer oaths, present and receive evidence, and interrogate, examine, and cross-examine *the alien or witness*."

Section 242 (b) of Title II in Chapter 5 dealing with deportation, grants the power to "* * * administer oaths, present and receive evidence, interrogate, examine, and cross-examine *the alien or witnesses* * * ***.

Section 287 (a) of Title II in Chapter 9, entitled "Miscellaneous", grants the power "* * * to interrogate *any alien or person believed to be an alien* * * ***.

Section 287 (b) grants the power "* * * to administer oaths and to take and consider evidence concerning the privilege of any person * * ***.

Section 335 (b) of Title III in Chapter 2 dealing with "Nationality through Naturalization" grants the power "* * * to take testimony concerning any matter touching or in any way affecting the admissibility of *any petitioner for naturalization*, to administer oaths, including the oath of the petitioner for naturalization and the oaths of *petitioner's witnesses* to the petition for naturalization, and to require by subpena the attendance and testimony of *witnesses, including petitioner* * * ***.

Section 336 (d) of Title III of said Chapter 2 grants the power to the Attorney General "* * * to appear before

any court in any naturalization proceedings for the purpose of cross-examining the *petitioner and the witnesses* * * *". (Italics supplied)

Each title, therefore, is made sufficient unto itself in the field of enforcement.

In addition, and very importantly, Title III dealing with "Nationality and Naturalization" sets forth a judicial procedure to be followed in an Equity suit to bring about the cancellation of a Cerificate of Naturalization.

Such facts unerringly point to the intent of Congress to integrate all of the laws pertaining to immigration, nationality and naturalization into one harmonious whole, each subject matter being dealt with separately and entirely under its own Title, with its own substantive law and procedure for the enforcement thereof. Congress made it clear, therefore, that the enforcement provisions contained under each Title should be confined to the enforcement of proceedings involving the substantive law in said Title. To hold otherwise would be to say that the subpoena powers granted in the other Title of the Act are meaningless, duplicitous, and a wholly unnecessary reiteration. The Court ought not to so construe the Act as to render parts of its meaningless or a mere reiteration, especially when so carefully and methodically arranged in the law. We conclude, therefore, that the subpoena power contained in Section 235 (a) of the Act relates to, and can be used only in, the enforcement of the Title in which it is found, which deals with entry and exclusion. The Petitioners being resident citizens are, in consequence, not amenable to such subpoena power.

Nowhere in the Act does it state or provide that a sub-

poena may issue to a "citizen" in a proceeding affecting his status. His status can only be impeached or challenged in an Equity suit as provided by Section 340 where he is given the protection of the judicial process. The attempt of the Immigration Service to compel the Petitioners to testify to matters relating to naturalization by the service upon them of subpoenas issued under Section 235 (a) is an attempt to subvert the plain provisions of the Act, and to pre-empt the judicial process by administrative action.

The history of the laws on the subject of Immigration and Nationality shows that at no time did Congress grant to the Immigration Service the right to subpoena a "citizen" in a matter involving himself.

The provisions contained in the several Titles granting the Service the power to interrogate, examine, cross-examine, and to subpoena, particularly classify the categories of persons subject to such powers.

This clear distinction made by Congress, and the legislative history of the Act, (House Report No. 1365, U. S. Code Servige, 1952, pp. 1709-10), point up the intent of Congress to exclude a resident citizen from such subpoena power in a matter involving himself.

The further point is urged that the Attorney General himself in Part 287, Section 287.4 of the Code of Federal Regulations promulgated by him to implement the Act, specifically excludes from the power granted therein to immigration officers to issue subpoenas, the right to issue subpoenas in Naturalization matters by the use of the words "Except as provided in § 335.11" of such Regulations. Hence the power to issue subpoenas thereunder is

necessarily limited to Immigration matters, in conformance with the pattern laid down by Congress. This is confirmed by the Attorney General in the Regulations which follow the same pattern. For instance—Part 287, Section 287.4 of the Regulations, implementing Section 287 of the Act, appears in "Subchapter B—Immigration Regulations", whereas, Part 335, Section 335.11 implementing Section 335 (b) of the Act, appears in "Subchapter C—Nationality Regulations". [Appendix A (2), B (2), C (2), D, (2)]

ARGUMENT

I

THE POWER TO SUBPOENA "WITNESSES" GRANTED BY SECTION 235 (a) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 DOES NOT INCLUDE THE POWER TO SUBPOENA A "PARTY".

The duties of immigration officers in an inquiry relating to an alien seeking to enter the United States was first set forth in Section 8 of the Act of March 3, 1891 (26 Stat. 1084; 8 U. S. C. 101), in the following language:

> "* * * The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record. * * *"

This power next appears in Section 24 of the Act of March 3, 1903 (32 Stat. 1213; 8 U. S. C.), in the following language:

> "* * * Immigration officers shall have power to administer oaths and to take and consider testimony touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such testimony, and any person to whom such oath has been administered under the provisions of this Act who shall knowingly or willfully give false testimony or swear to any false statement in any way affecting or in relation to the right of any alien to admission to the United States shall be guilty of perjury and shall be punished as

provided by section fifty-three hundred and ninety-two, United States Revised Statutes. * * *"

The above provision was carried over verbatim into Section 24 of the Act of February 20, 1907 (34 Stat. 898; 8 U. S. C.).

Thereafter, such power was broadened by Section 16 of the Act of February 5, 1917 (39 Stat. 874; 8 U. S. C.), which provided in part as follows:

"* * * All aliens coming into the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they intend to abide in the United States permanently and become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes enumerated in section 3 hereof. Any district director of immigration and naturalization designated by the Commissioner or any inspector in charge *shall also* have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States, and to that end may invoke the aid of any Court of the United States; and any district court within the jurisdiction of which investigations are being conducted by an immigrant inspector, may, in the event of neglect or refusal to respond to a subpoena issued by any such district director, or inspector in charge or refusal to testify before such immigrant inspector, issue an order requiring *such*

person to appear before said immigrant inspector, produce books, papers, and documents, if demanded, and testify; and any failure to obey such order of the Court may be punished by the Court as a contempt thereof. * * *" (Italics supplied).

The Act of June 27, 1952 continues and expands such power in Section 235 (a) thereof in the following language:

> court may be punished by the court as a contempt * * * Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States *or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service*, and to that end may invoke the aid of any Court of the United States. * * *" (Italics supplied).

A careful review of the various Acts of Congress set forth above relating particularly to examination by the Immigration Service shows that at first the subpoena power was not granted to the Immigration Service; that the power of the Service was limited to the administering of oaths and taking and considering testimony touching the right of aliens to enter the United States. Since no subpoena power was granted in the original enactment, it is obvious that the testimony which the Service was therein empowered to take and consider in addition to that of the alien, of necessity referred to testimony of witnesses who voluntarily offered such testimony.

By the Act of 1917, Congress in re-enacting in effect the provision of the Acts of 1891 and 1903 relating to the power to administer oaths, and to take and consider testimony, and expanding the power of the Immigration Service by granting certain members thereof the power to require by subpoena the attendance and testimony of witnesses, must have intended such power to subpoena to be exercised only in the case of "witnesses" as distinguished from the "alien" himself and the language employed and the history of the provision clearly evinces such intention. The alien seeking to enter the United States was then, as under the previous Acts and now is under the present Act, subject to examination by the Service before he was permitted to enter the country. He was compelled by his very desire to enter the country to submit to questioning under oath. No subpoena, therefore, was necessary to compel his appearance or testimony and if he failed to give testimony required of him, he would be denied admittance. Hence, no subpoena power as to the alien was needed or required. Such was not the case as to

"witnesses". The subpoena power granted by the Act of 1917, therefore, granted a power to the Immigration Service it did not formerly possess, and by its language, was intended to apply only to "witnesses" other than the alien. The power thus conferred *was in addition* to the power already possessed by the Service, as evidenced by the use of the words "shall *also* have power.".

When the said subpoena power was re-enacted and expanded by Section 23[illegible](a) of the Act of 1952, the language employed is significant. The Attorney General and certain officers of the Immigration Service "shall have power to require by subpoena"

1. "the attendance and testimony of witnesses";
2. "the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States"; and
3. "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service".

Such statement poses two questions:

1. To what category of persons did the Congress intend the subpoena power to apply?

2. To what subject matter did Congress intend the inquiry to be directed?

The Service argues that the grant of the above power enables it to subpoena the attendance of a resident naturalized citizen to give testimony under oath with regard to a matter involving his naturalization. If the Service is right in its contention, then it must follow that:

First: That the Petitioners are "witnesses" within the purview of Section 235 (a); and.

Second: That such subpoena power relates to naturalization as well as immigration.

We cannot accept as correct the construction contended for by the Service, nor the correctness of the assumptions which flow therefrom.

We have already seen the word "witnesses" as used in the Act of 1917 applied only to persons other than the alien. There is nothing in the Act of 1952 to suggest that the subpoena power therein contained was expanded to include the *subject* of an inquiry either under the immigration provisions of said Act or the naturalization provisions thereof. The language used in Section 235 (a) aforesaid is exactly the same as contained in Section 16 of the Act of 1917 except as to the nomenclature of the officers empowered to act. The additional power granted in said Section 235 (a) by the words "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service" therefore, can only be construed to refer to the *subject matter* of the inquiry. The plain intent of Congress seems to have been to carry into the Act of 1952 the same subpoena power granted to the Service in the Act of 1917 and to extend the *scope* of the inquiry; but Congress did not intend by the use of such language to extend the jurisdiction of such subpoena to cover the *subject* of the inquiry. And it can hardly be assumed that the Congress, in codifying for the first time the entire body of law relating to immigration and naturalization with its multitudinous chapters, titles, and sections, intended to grant to the Im-

migration Service a power relating to naturalization proceeding which it did not theretofore possess, by means of a correlative clause contained in a section of the law relating to immigration and titled "Inspection by Immigration Officers":

"It will be noted that where Congress intended and did, in fact, grant to the Attorney General and to the Immigration and Naturalization Service the right to subpoena and the right to interrogate and to examine, it made the distinction between the alien, the petitioner or applicant for naturalization, and the witnesses, by including each of them by name in the several sections granting such power to interrogate or to examine.

This distinction is pointed out and emphasized by Circuit Judge Hastie in writing for the Court of Appeals for the Third Circuit, in the case of Abraham Minker (217 F. 2d 350, 351, 352) to be argued contemporaneously with the instant case, in the following language:

> "In 1952 Congress repeated the entire body of our statutory immigration and nationality laws. Immigration and Nationality Act of 1952, 66 Stat. 163; 8 U. S. C., 1952 ed., ch. 12. The provision we now are construing is new language in the 1952 Act. The section in which it appears is only one of several scattered throughout the Act in which some provision is made concerning witnesses. Therefore, it is significant that in several such sections where Congress wished to make a provision as to witnesses applicable to parties in interest, it said so. In prescribing naturalization procedure, Congress granted the subpoena in these terms:
>
> "'The Attorney General shall designate one

ployees of the Service to conduct preliminary examinations upon petitions for naturalization . . . for such purposes any such employee . . . is authorized . . . to require by subpoena the attendance and testimony of witnesses, including petitioner, . . .' 8 U. S. C., 1952 ed., § 335 (b).

"Similar precision appears in the regulation of deportation procedure:

"'A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses . . .' 8 U. S. C., 1952 ed., § 242 (b).

"Almost identical language appears in connection with the exclusion of aliens:

"'A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses.' 8 U. S. C., 1952 ed., § 236 (a).

"Again, it is provided:

"'The Attorney General shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, including the petitioner, . . .' 8 U. S. C., 1952 ed., § 336 (d).

"In these circumstances the failure to make any equivalent amplification of the witness category in

Section 235 (a) is some indication that none was intended."

The conclusion of the Court of Appeals in the *Minker* case in its decision as aforesaid, is borne out by the remarks contained in House Report No. 1365, U. S. Code, Vol. 2, 82nd Congress, 2nd Session, 1952, pages 1710, in the "Analysis of the Bill", wherein it states as follows:

"* * * Immigration officers are also granted the power to subpoena the attendance and testimony of witnesses, and the production of books, papers, and documents in aid of the enforcement of the provisions of the bill. An alien who does not appear, to the examining immigration officers, to be admissible clearly and beyond a reasonable doubt, shall be detained for further inquiry by a special inquiry officer." (Appx. E, p. 84).

II

THE POWER TO SUBPOENA, GRANTED BY SECTION 235 (a) OF THE IMMIGRATION AND NATIONALITY ACT OF JUNE 27, 1952, HAS NO APPLICATION TO INVESTIGATIONS MADE FOR THE PURPOSE OF ESTABLISHING A BASIS FOR DENATURALIZATION SUITS.

The record on appeal discloses that the information sought to be elicited from the Petitioners by means of the subpoena and show cause order in re: Joseph Falcone (subpoena R. 5) (order R. 2), affidavit of Harold E. Barnes (R. 3), and in re: Salvatore Falcone (subpoena R. 20), was information relating to their respective

naturalization certificates, and it appears from the memorandum-decision of Judge Foley of the District Court, the Government frankly stated that the legality of the naturalization of the Falcones is being investigated (R. 29).

The Act of 1952 sets out in Title III thereof, a complete and precise procedure for naturalization of aliens, including investigation and examination, under oath, by the Service of the applicant for citizenship and witnesses as provided by the subpoena power granted in Section 335 (b), and by the Court as provided in Section 336 thereof. Section 340 of said Title III sets forth a complete and precise procedure for the denaturalization of a naturalized citizen on the grounds therein specified by means of a suit in Equity.

The District Court places its decision mainly on the ground that "If the subpoenas here were allowed to stand, the judicial procedure for the revocation of naturalization certificates would be pre-empted by administrative action, and the provisions for personal notice, sixty-day time period to answer in section 340 (b) of the Act would be empty words." (R. 34).

We believe and urge that the decision of the District Court was correct in so holding but that such decision is supported on other grounds:

First: That the power granted the Immigration Service applies only to matters involving *persons* seeking to enter the United States.

Second: That the grant of the certificates of naturalization is a judicial act which, when exercised, judicially establishes that the recipient thereof entered the United

States legally and has duly qualified for citizenship, and such person is not thereafter subject to the administrative process, except as a witness in a proceeding touching another person.

The investigatory power contained in Section 235 (a) includes "* * * power to administer oaths and to take and consider evidence of and from any *person* touching the privilege of any *alien* or *person he believes or suspects to be an alien* to enter, reenter, pass through or reside in the United States. * * *" And also "Any *person* coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an *alien*, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a *national* of the United States or an *alien* and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. * * *"; then follows the subpoena power to examine witnesses etc. "relating to the privilege of any *person* to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." (Italics supplied).

An analysis of the authority thus granted to the immigration officers inexorably leads us to the conclusion that it was the intention of Congress to arm the Immigration Service with power to screen all *persons* seeking to enter the United States for the purpose of determining who, among them, are *aliens* and who are *nationals*. All such

persons may be required to answer certain questions; if the examination discloses the person to be a *national*, no further provision is made as to his examination; if the examination discloses that the person is an *alien*, then such examination may be continued to determine whether he belongs to any of the excluded classes. To implement such authority, the Attorney General and any immigration officer, including special inquiry officers, is granted the power to subpoena the attendance of witnesses, for the purpose of determining the eligibility of any person to enter the United States.

The power thus granted relates solely to matters of immigration. The use of the words "relating to the privilege of any person to enter, re-enter, reside in, or pass through the United States", can only refer to an "*alien*" since only an alien is granted the privilege to enter, re-enter, reside in or pass through the United States—whereas a *citizen* has a *right* to do so.

There is no express grant of authority to examine a citizen of the United States, whether natural born or naturalized, to be found in Section 235 (a) or in any other section of the Act of 1952, except the power to subpoena and examine him as a witness in a hearing involving the status of another person.

The Government's contention that the substitution of the word "person" in the 1952 Act, in place of the word "alien" used in Section 16 of the Act of 1917, grants such authority is not borne out by the careful reading of the entire section or by the intent of Congress as appears in House Report No. 1365, (U. S. Code, Congressional and Administrative News, Vol. 2, 82nd Congress, Second

Session, 1952, pages 1683 to 1750 "Analysis of the Bill" (Appendix E)).

Senator McCarran, one of the authors of the Act, gives substance to this argument when in the debate in Congress on the President's veto message of the said McCarran-Walter Bill, Senator McCarran remarked:

> "The President states that all our citizens returning from abroad would be subjected to serious risk of unreasonable invasions of privacy; but he does not explain how this would come about under the provisions of the bill. I say to you, Mr. President, that there is nothing in the bill which is before us which would permit unreasonable invasions of privacy of citizens, as alleged by the President.
>
> "The President alleges that the bill contains provisions which would result in empowering minor immigration and consular officials to act as prosecutor, judge, and jury in determining whether acts constituting a crime have been committed. Nowhere in the bill, Mr. President, is there such a provision which would permit such action in the administration of the immigration laws."

It would appear from such language that the President of the United States in reviewing the provisions of the Act concluded that the citizens affected by these provisions were *citizens returning from abroad* (a matter involving immigration) and not citizens residing in the United States: (Congressional Record—Senate, 82nd Congress, 2nd Session, Vol. 98, Part 6, Page 8254).

III

ASSUMING THAT THE IMMIGRATION SERVICE HAD THE POWER UNDER SECTION 235 (a) TO ISSUE A SUBPOENA TO THE PETITIONERS HEREIN, THEN ITS RIGHT TO EXAMINE PURSUANT THERETO CEASED UPON THE SUBMISSION OF EVIDENCE BY THE PETITIONERS THAT THEY WERE DULY NATURALIZED AMERICAN CITIZENS.

The intent of Congress in its revision and codification of the laws relating to immigration, naturalization and nationality is made abundantly clear by House Report No. 1365, dated February 14, 1952; reported in U. S. Code, Congressional and Administrative News, Vol. 2, 82nd Congress, Second Session, 1952, at pages 1653 to 1750, where in the "Analysis of the Bill" it states under Title I—General:

> "3. Powers and Duties of the Attorney General and the Secretary of State"
>
> "Section 105 is intended to strengthen security of screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States." (Appendix E.)

and under Title II—Immigration—numbered and titled "4. Entry, Exclusion, and Deportation of Aliens (Ch. 4 and Sec. 287)" in the analysis of the provisions of Section 235 (a), the report continues:

> * * * It is not intended by this provision to sanction the indiscriminate questioning or harassment *of citizens returning to the United States*, but it is to be used by the immigration officers whenever there is reason to believe that a citizen *is violating* or *about to violate* the law and is about to become expatriated. * * * (Italics supplied) (Appendix E, p. 84).

It would appear from the foregoing language that the purpose of Congress in substituting in the Act of 1952 the word "person" in place of the word "alien", which was used in the Act of 1917, was to afford the immigration officers the right to examine an incoming person to determine whether he is a national of the United States or an alien, and if the former, to empower the Service to examine him to determine whether he is violating or about to violate the law and is about to become expatriated, and if the latter, to determine whether he is subject to exclusion.

The record herein discloses that the **Petitioners are first: not aliens; second: not citizens returning to the United States; third: not citizens violating or about to violate the law; and fourth: not subversives. The record shows that the Petitioners have resided in the United States for upwards of 47 years and have been citizens for upwards of 30 years.**

There is nothing expressed in the analysis above referred to to suggest that it was the intention of Congress to grant the Service the power to indiscriminately or otherwise examine a citizen while actually residing in the United States in a matter involving himself. And if it be

thought that the Service, by such Act has the power to inquire whether the Petitioners are aliens or citizens, then such power was completely satisfied when the Petitioners produced before the immigration officer their birth certificates and naturalization certificates (R. 4 (7), 9, 24, 25, 26; Pet. Ex. 38, 39 (6)). Any further examination was precluded by the proof of their citizenship.

As Justice Brandeis stated writing for the Court in *Bilokumsky* v. *Tod*, 263 U. S. 149, 152, 153,:

> "If, in the deportation proceedings, Bilokumsky had claimed that he was a citizen and had supported the claim by substantial evidence, he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal. Ng Fung Ho v. White, 259 U. S. 276, 281."

If the grant of authority to the Immigration Service in Section 235 (a) to subpoena witnesses to testify "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service" is to be taken out of context and is construed to the extent contended for by the Service; then there is absolutely no limitation on the investigatory power of the Service, despite the distinction made in the Act between "aliens" and "witnesses", and despite the failure of Congress to designate citizens, whether naturalized or not, as being subject to the authority therein granted. This result was certainly not intended by Congress if its intent, as expressed in the foregoing report was correctly expressed. And further, had Congress intended to grant an all-inclusive and all-embracing investigatory power applicable to the entire Act, there would have been no need for the Congress to have provided such power

separately in the other sections of the Act, particularly in Sections 335 (b) and 336 (d) of the Naturalization portion thereof; Sections 242 (b) and 287 (b) of the Deportation portion thereof; and Section 236 (a) of the Exclusion portion thereof.

IV

HUMAN RIGHTS ARE SUBJECT TO AND PROTECTED BY THE JUDICIAL PROCESS GUARANTEED BY THE BILL OF RIGHTS AND THE CONSTITUTION AS OPPOSED TO THE ADMINISTRATIVE PROCESS.

While Congress has the undoubted power and has, in a great many instances, granted investigative and accusatory power with respect to the operations of corporations engaged in Interstate Commerce to administrative agencies, created to police such corporations, it does not follow that such powers may be granted to the Immigration Service in its quest for information as to the private rights of an individual citizen.

When, therefore, the Circuit Court of Appeals in the instant case, in its opinion quoted the statement of this Court in "United States v. Morton Salt Co." (338 U. S. 632, 642-3) (1950), to wit:

> "The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative

agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law."

the Circuit Court of Appeals by such language recognized the right of the Federal Trade Commission to exact information from an industrial corporation doing business in Interstate Commerce relating to the operation of its business. Such language has no application whatsoever to a matter affecting the lives of these Petitioners and others similarly situated. It is interesting to note the further language used in said decision wherein it states as follows at pages 651-652:

"* * * Although the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men,' Brandeis, J., dissenting in Olmstead v. United States, 277 U. S. 438-471, at page 478, 48 S. Ct. 564, 570, 572, 72 L. Ed. 944, 94 A. L. R. 376, is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; Hale v. Henkel, 201 U. S. 43, 70, 26 S. Ct. 370, 377, 50 L. Ed. 652, *neither incorporated associations nor unincorporated associa-*

lic can plead an unqualified right to conduct their affairs in secret. Hale v. Henkel, supra, United States v. White, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542, 152 A. L. R. 1202.

"While they may and should have protection from unlawful demands made in the name of public investigation; cf. Federal Trade Comm. v. American Tobacco Co., 264 U. S. 298, 44 S. Ct. 336, 68 L. Ed. 696, 32 A. L. R. 786, *corporations can claim no equality with individuals in the enjoyment of a right of privacy.* Cf. United States v. White, supra. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. * * *." (Italics supplied)

The Government has contended in its brief (p. 22) in the Court below that "nothing more is sought by this order than that the naturalized subject fulfill the obligation imposed upon every petitioner for naturalization. If he has concealed nothing from the court, he will not be prejudiced by the interrogation. And if he has perpetrated a fraud upon the naturalization court, he is not deserving of citizenship and he should not be granted immunity from interrogation as to prevent disclosure of the fraud."

This is plausible language indeed, but it completely ignores the historic struggles of peoples to achieve a measure of protection from the prying power of the State, and assumes as immaterial the hard-won safeguards that the people, through their Constitution, have thrown about

the person to shield him from the effects of such plausible language—such as the right to refuse to talk when charged with a crime, or the right to be safe in one's person against unreasonable search and seizure. In either of such cases, experience taught the founding fathers that such political philosophy did not afford protection even to the innocent and, hence, placed a restraining hand upon the sovereign power. The life and liberty of man is not to be entrusted to the unrestrained judgment of his fellow man but shall be judged by the law. History has confirmed the wisdom of the Bill of Rights. Moreover, when Petitioners, by a judicial act: a judgment of the Supreme Court of the State of New York, became citizens of the United States, they had reached the point in status beyond the status of an applicant or *petitioner* for naturalization. Section 235 (a) grants the subpoena power to examine witnesses touching the *privilege* of any person to enter, reenter, pass through, or reside in the United States. The *alien* is accorded the *privilege* to enter or to reside in the United States, but the certificate of naturalization won by the Petitioners herein after an exhaustive investigation by the Immigration and Naturalization Service, prior to the filing of their petition, and examination by the Court, invested them with the *right* to reside in the United States, and such *right* continues in full force while their certificates of naturalization remain unimpeached. Such Certificates, resulting from the exercise of the judicial process, should not be annulled by administrative action where a judicial proceeding is set up to accomplish such purpose, and especially where, as the Government contends, a pre-trial examination in such suit can accomplish the very purpose it now seeks to accomplish.

V

THE DECISION OF THE COURT BELOW IS WRONG AND SHOULD BE REVERSED AND THE DECISION OF THE DISTRICT COURT AFFIRMED.

We seriously disagree with the reasoning adopted by Circuit Judge Medina writing the opinion of the Court below wherein he states: (R. 50)

> "In view of the broad general language of Section 235 (a) it does not seem to us surprising that no reference is made in Section 340 to the administrative investigatory powers which the Service now seeks to exercise. Nor do we find anything improperly included in or omitted from the Regulations, now so clearly integrated with the various sections of the Act. There is no point in merely repeating in the Regulations something already apparent on the face of the statute. * * *"

The answer is that, despite Section 235 (a), Congress did grant to the Service investigatory powers in Sections 236 (a), 242 (b), 287, 335 (b), and 336 (d). If the investigatory power granted by Section 235 (a) was intended by Congress to be broad enough to cover proceedings under Section 340, why was it not broad enough to cover the proceedings set forth in Sections 236 (a), 242 (b), 287, 335 (b), and 336 (d) so as to make unnecessary this repetition? It is our view, as expressed by Federal District Court Judge Weinfeld, in re Oddo, U. S. D. C., S. D. of N. Y., 147 F. Supp. 323, reversed by the same decision of the Court of Appeals rendered herein, that "* * * if the subpoena power in Title II, Sec. 235 (a), were intended to

extend to and to apply to all sections of the Act, as the government contends, then Sec. 335 (b) of Title III is duplicitous and serves no function. The Act is not to be construed so as to make a provision meaningless."

Further, if there is no point in merely repeating in the Regulations promulgated by the Attorney General something already apparent on the face of the Act, why were so many provisions, in fact, so repeated? The answer is that the omission of the Attorney General to include in the Regulations, the power now asserted by the government, was a conscious one and that he had construed Section 235 (a) as not granting to the Service the right to subpoena citizens: (See Section 235.51 of the Code of Federal Regulations (Appendix A.—(2.)), since the Department of Justice made an exhaustive study of the Act prior to its passage and submitted a 522-page report thereon (U. S. Code, Congressional and Administrative News, Vol. 2, 82nd Congress, Second Session, 1952, Page 1678).

Circuit Judge Medina further states: (R. 48)

> "* * * It seems to be thought that the nature of adversary proceedings of a judicial nature is such that the rights of the United States as petitioner in a denaturalization proceeding, as to discovery and other procedural matters, should be on a parity with those of the respondent therein, despite the special interest of the government in matters relating to immigration and naturalization; and the undoubted power of the Congress to make provision for investigations by government officials preliminary to the commencement of action in court. * * *"

We contend that as a petitioner in a denaturalization action, the United States, despite the special interest alluded to by Circuit Judge Medina, stands in no more advantageous position, vis-à-vis a citizen, than any other litigant in a civil proceeding. *If such were not the case, our system of government would be a government of men rather than one of laws, and the rights guaranteed a citizen would, indeed, be empty words.* The Courts have stated time and time again that the burden of proof in such an action is on the government and that a Certificate of Naturalization cannot be annulled except upon "clear, unequivocal, and convincing evidence." (U. S. vs. Sharrock, 276 Fed. 30; Chenzer vs. U. S., 150 Fed. 2d 535; U. S. v. Knauer, 149 Fed. 2d 519; Jogwick vs. U. S., 142 Fed. 2d 298; Baumgartner vs. U. S., 322 U. S. 655).

We do not doubt the undoubted power of the Congress to grant power to its officials to make preliminary investigations prior to the commencement of actions in Court. We do doubt Congress granted such power by the provision in question here.

Circuit Judge Medina is also of the view that: (R. 49)

> "* * * the subject matter of immigration and naturalization are sui generis; and the exercise of these administrative and judicial investigatory powers side by side and pari passu is, it seems to us, clearly envisioned by the pattern of the statute."

Sui Generis is defined in Black's Law Dictionary, Third Edition, as "of its own kind or class; i.e. the only one of its own kind; peculiar."

The only relationship between the two categories which we are able to discern is one of juxtaposition. In our

view, there is no similarity, let alone kinship, between the subject matter of immigration and the subject matter of naturalization. The fact that one going through naturalization proceedings must, perforce, have first gone through immigration proceedings, does not place both of such proceedings in the same class, in our view. One is as distinct from the other as night is from day, although as in such case, one follows the other seriatem.

Senator Lehman in the Debate on the Act prior to its passage, (Congressional Record, Vol. 98, Part 4, Page 5114), stated that there are 8 million naturalized citizens in the United States. Are we to say that the Attorney General and the Immigration Service are granted the unrestricted and unfettered right, under Section 235 (a) to roam the land and, in their own discretion; to issue subpoenas against each of these 8 million citizens, out of thin air, without even first being obliged to make a showing of probable cause, in order to double check the right of such citizens to a status which many of them have treasured for a good many years?

If, as Circuit Judge Medina thinks, the strengthened provisions of the Act were adopted by Congress because it "* * * was particularly sensitive to the need for prompt and effective dealing with subversives. * * *" (R. 52), the purpose of such action is not served in the instant case since it is conceded by Circuit Judge Medina that "* * *. Nothing in these records now before us indicates that any of the respondents has ever been engaged in or had any knowledge of subversive activities of any kind. * * *" (R. 53).

We share with Circuit Judge Medina and the Circuit

Court of Appeals their solicitude for the welfare of our Country, and their view that a liberal interpretation should be given to the laws passed by Congress to protect the welfare of the nation. However, we believe too, that when such laws affect or impinge upon the privacy and the rights and immunities of citizens under the Constitution, that in such cases, such laws ought to be carefully scrutinized and strictly construed.

Circuit Judge Hastie in writing the opinion for the Circuit Court of Appeals in the Abraham Minker case observed that the penalty in denaturalization cases may be deportation which is a far more drastic punishment than is sometimes meted out in criminal cases. He concludes that the Act in question has a "punitive impact", and, therefore, like the criminal statutes should be strictly construed. To do otherwise would place the fate of 8 million American citizens within the sole discretion of the many immigration officers and special inquiry officers who in addition to the Attorney General are authorized to issue subpoenas under Section 235 (a). We cannot believe that Congress intended any such dire result.

CONCLUSION

FOR THE REASONS STATED IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENTS OF THE COURT BELOW SHOULD BE REVERSED.

ANTHONY S. FALCONE
Counsel for Petitioners

Dated: August 17, 1955.

APPENDIX A.—(1).

Title II.—Immigration, Chapter 4.—Provision Relating to Entry and Exclusion

INSPECTION BY IMMIGRATION OFFICERS.

"Sec. 235. (a) The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an

alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States, or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

(b) Every alien (other than an alien crewman), and except as otherwise provided in subsection (e) of this section and in section 273 (d), who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special in-

quiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

"(c) Any alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under paragraph (27), (28), or (29) of section 212 (a) shall be temporarily excluded, and no further inquiry by a special inquiry officer shall be conducted until after the case is reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman.

APPENDIX A.—(2)

8 CFR Part 235—Inspection of Aliens Applying For Admission

Source: §§ 235.1 to 235.51 appear at 17 F. R. 11906, Dec. 19, 1952.

SUBPART A—SUBSTANTIVE PROVISIONS

§ 235.1 *General qualifications and requirements for the admission of aliens.* The following general qualifications and requirements shall be met by an alien seeking to enter the United States regardless of whether he seeks to enter for permanent, indefinite, or temporary stay, and regardless of the purpose for which he seeks to enter:

(a) The alien shall apply in person at a place designated as a port of entry for aliens.

(b) The alien shall apply for admission at a time when the immigration office at the port is open for the inspection of applicants for admission.

(c) The alien shall make his application in person to an immigration officer.

(d) The alien shall present whatever documents are required.

(e) The alien shall establish to the satisfaction of the immigration officer that he is not subject to exclusion under the immigration laws, Executive orders, or Presidential proclamations and that he is entitled under all of the applicable provisions of the immigration laws and this chapter to enter the United States.

235.2 *Examination postponed*—(a) *Alien and members of family.* Whenever an alien upon arrival, or pending the determination of his right to admission to the United States, is found or believed to be suffering from a disability which in the opinion of the examining immigration officer or special inquiry officer renders it impracticable to proceed with the examination under the Immigration and Nationality Act, the facts shall be reported to the district director, or officer in charge having administrative jurisdiction over the port of arrival who shall determine whether the examination should proceed or be postponed. If the examination is postponed and the testimony of such alien is required to determine the admissibility of members of his family, the determination of such cases may be postponed in the discretion of such district director or officer in charge, until the examination of such alien becomes practicable. If such alien's testimony is not so required, and if the alien's admission is in no manner necessary to the financial support of the remaining family members and he appears to be eligible for admission provided he recovers from the disability or no disability is found to exist, the family members may be examined forthwith and, if found eligible for admission to the United States, admitted:

(1) Upon the deposit of a sum of money (or transportation ticket and money) sufficient to defray the expenses of conveying the alien whose case is postponed to his final destination; and

(2) Upon the deposit of a further sum of money (or transportation ticket and money) sufficient to cover the cost of the service and transportation of a proper attendant from the port of arrival to the point of destination or

deportation and return, if it appears to the officer in charge that such attendant is or may be necessary for the proper care and attention of the alien.

(b) *Accompanying alien.* If it appears to the examining immigration officer that an alien not found to be admissible is likely to be certified by the examining medical officer as helpless from sickness or mental or physical disability or infancy, pursuant to section 237 (c) of the Immigration and Nationality Act, the examination of any accompanying alien, whose protection or guardianship will be required by the alien not found admissible, shall be postponed pending decision of the case of the alien likely to be excluded.

§ 235.3 *Detention of aliens.* All aliens (including aliens crewmen) arriving at a port in the United States by vessel or aircraft shall be detained aboard the vessel or at the airport of arrival by the master, commanding officer, purser, person in charge, agent, owner, or consignee of such vessel or aircraft until admitted or otherwise permitted to land by an officer of the Service. Notice or order to so detain shall not be required.

§ 235.4 *Admitted alien assisted.* Notwithstanding admission, and for reasons satisfactory to the district director or officer in charge, when facilities are available, any alien may remain a few days at an immigration station upon payment of the actual cost of such maintenance. If in such a case the delay in leaving the immigration station is due to accident or other unavoidable circumstances and the alien is without sufficient means to defray the expenses incident thereto, the district director or the officer in charge may in his discretion authorize such ex-

pense, but in such event he shall report the case promptly to the regional office with full reasons for his action and request that the authorization be ratified.

(Amended, 19 F. R. 9178, Dec. 24, 1954)

§ 235.5 *Preexamination in certain parts of the United States; who may apply.* When an office of the Service is located in Hawaii, Alaska, Guam, Puerto Rico, the Virgin Islands of the United States, or any outlying possession of the United States, a person (whether an alien or one claiming United States nationality) who is residing, and is entitled under the immigration laws to reside permanently, in any of the places enumerated in this section, and who intends to apply for temporary or permanent admission to any other part of the United States or outlying possession of the United States, may appear before the district director or the officer in charge having administrative jurisdiction over such office for examination as to his admissibility to the United States.

§ 235.6 *Preinspection in certain parts of the United States.* In the case of any aircraft proceeding from Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States destined directly and without touching at a foreign port or place to any other of such places or to the continental United States, the examination required by the Immigration and Nationality Act of the passengers and crew may be made prior to the departure of the aircraft, and in such event, final determination of admissibility shall be made immediately prior to such departure. The examination shall be conducted in accordance with sections 234, 235, 236, and 237 of the Immigration and Nationality Act and this part and Parts 236 and

237 of this chapter, except that if it appears to the examining immigration officer that any person in the United States being examined under this section is prima facie deportable from the United States, further action with respect to his examination shall be deferred and an application for a warrant of arrest shall be made and further proceedings conducted as provided in section 242 of the Immigration and Nationality Act and Part 242 of this chapter. When the inspection procedure described above is applied to any aircraft, persons examined and found admissible shall be placed aboard the aircraft, or kept at the airport separate and apart from the general public until they are permitted to board the aircraft. No other person shall be permitted to depart on such aircraft until and unless he is found to be admissible as provided in this section.

(Amended, 18 F. R. 6316, Oct. 2, 1953)

SUBPART B—PROCEDURAL AND OTHER NONSUBSTANTIVE PROVISIONS

§ 235.11 *Notice of referral to Special Inquiry Officer.* If, in accordance with the provisions of section 235 (b) of the Immigration and Nationality Act, the examining immigration officer retains an alien for further inquiry before a special inquiry officer, he shall immediately sign and deliver to the alien a Notice To Alien Detained For Hearing By Special Inquiry Officer (Form I-122). If the alien is unable to read or understand the notice, it shall be read and explained to him by an employee of the Service, through an interpreter, if necessary, prior to such further inquiry.

§ 235.12 *Referral of certain cases to district director or*

officer in charge. The immigration officer conducting the preliminary examination of an alien who is applying for admission to the United States for permanent residence and who is liable to be excluded because he is likely to become a public charge or because of a physical disability other than tuberculosis, leprosy, or a dangerous contagious disease, shall refer the question of the alien's admission to the district director or officer in charge having administrative jurisdiction over the place where the examination is being conducted. The district director or officer in charge may, in his discretion, admit the alien on primary inspection, if the alien is otherwise admissible in accordance with Part 213 of this chapter. If the district director or officer in charge does not so admit the alien, the question of his admission shall be referred to a special inquiry officer, and the special inquiry officer may, in his discretion, admit the alien, if he is otherwise admissible in accordance with the provisions of Part 213 of this chapter. The immigration officer conducting the preliminary examination at a port of entry of an alien applying for temporary admission to the United States who is liable to be excluded on grounds other than those set forth in paragraph (9), (10), (23) or (28) of section 212 (a) of the Immigration and Nationality Act and who appears to be eligible to apply for the exercise of discretion under the provisions of section 212 (d) (3) of that act and § 212.8 of this chapter, shall, if the alien applies for the exercise of such discretion, defer further examination and refer the application to the district director having jurisdiction over the place where the examination is being conducted. The immigration officer conducting the preliminary examination at a port of entry of an alien applying for permanent admission to the United States who is liable to be

excluded on grounds other than those set forth in paragraph (27), (28), or (29) of section 212 (a) of the act and who appears to be eligible to apply for the exercise of discretion under the provisions of section 212 (c) of that act and § 212.73 of this chapter, shall, if the alien applies for the exercise of such discretion, defer further examination and refer the application to the district director having jurisdiction over the place where the examination is being conducted.

(Revised, 18 F. R. 3580, June 19, 1953; subsequently, the last sentence set forth above was added, 19 F. R. 9478, Dec. 24, 1954.)

§ 235.13. *Reading test.* Aliens who are subject to the provisions of section 212 (a) (25) of the Immigration and Nationality Act shall demonstrate their ability to read and understand matter printed in plainly legible type and in a language or dialect designated by the alien at the time of examination. In applying the reading test immigration officers shall use the printed and numbered test slips supplied by the Service for that purpose, and a record shall be made upon the manifest or hearing record of the special inquiry officer showing both the class and serial number of the slip used in each case and the language or dialect designated by the applicant and actually used in the examination. No two aliens listed upon the same manifest sheet shall be examined at seaports by the use of the same slip. If the examining immigration officer is unable to speak and understand the language or dialect in which the alien is examined, the services of an interpreter shall be used for interpreting into spoken English the printed matter read by the alien. Whenever because of lack of the qualified interpreters necessary for the ob-

servance of the general method prescribed herein, or for any other reason, it is impracticable to adopt said general method, immigration officers may employ such other means as will clearly demonstrate the alien's ability, or lack of ability, to read and understand what he has read.

§ 235.14 *Notation in passports.* Whenever an alien admitted temporarily to the United States is issued a Form 257a or Form I-94C, the admitting officer shall, by means of a stamp, record on the passport presented by the alien the word "Admitted" and the date and place of admission. There shall be inscribed in the passport as a part of such notation the visa application number (including any letters that are part thereof) appearing on the form 257a, if such number does not appear in the passport visa, or the serial number (including any letters that are part thereof) of the Form I-94C. Whenever an alien is admitted permanently to the United States, the admitting immigration officer shall, by means of a stamp, record on any passport presented by the alien the word "Admitted," the date and place of admission, and the section of law under which the alien is admitted.

§ 235.15 *Temporary exclusion*—(a) *Report.* Any immigration officer who temporarily excludes an alien under the provisions of section 235 (c) of the Immigration and Nationality Act shall report such action promptly to the district director having administrative jurisdiction over the port at which such alien arrived. If the subject of the report is an alien who seeks to enter the United States other than under section 101 (a) (15) (D) of the Immigration and Nationality Act, the report shall be forwarded by the district director to the Commissioner and

further action shall be taken thereon as provided in paragraph (c) of this section.

(b) *Action in cases of alien crewmen.* If the subject of the report is an alien crewman who seeks to land as a nonimmigrant pursuant to section 101 (a) (15) (D) of the Immigration and Nationality Act, the district director shall determine whether the crewman is inadmissible to the United States under paragraph (27), (28), or (29) of section 212 (a) of that act. If the district director is satisfied that the crewman is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the district director, in the exercise of his discretion, concludes would be prejudicial to the public interest, safety, or security, he shall direct the examining immigration officer not to grant such crewman a conditional permit to land, and the reasons for taking such action shall not be disclosed to the crewman. Otherwise, the case shall be returned by the district director to an examining immigration officer to determine whether a conditional permit to land should be granted such crewman pursuant to section 252 of the Immigration and Nationality Act.

(c) *Action by Commissioner.* If the Commissioner is satisfied that the alien is inadmissible to the United States under paragraph (27), (28), or (29) of section 212 (a) of the Immigration and Nationality Act and if the Commissioner, in the exercise of his discretion, concludes that such inadmissibility is based on information of a confidential nature the disclosure of which would be prejudicial to the public interest, safety, or security, he may (1) deny any hearing or further hearing by a special inquiry officer and order such alien excluded and deported; or (2) enter

whether order in the case as he deems appropriate. In any other case the Commissioner shall direct that the alien be given a hearing or further hearing before a special inquiry officer.

(d) *Finality of decision.* The decision of the district director or the Commissioner provided for in paragraphs (b) and (c) of this section respectively shall be final and no appeal may be taken therefrom. The decision of the Commissioner shall be in writing, signed by him and, unless it contains confidential matter, a copy shall be served on the alien. If the decision contains confidential matter, a separate order showing only the ultimate disposition of the case shall be signed by the Commissioner and served on the alien.

(e) *Hearing by special inquiry officer.* In any case in which the Commissioner directs that an alien temporarily excluded be given a hearing or further hearing before a special inquiry officer, such hearing and all further proceedings in the case shall be conducted in accordance with the provisions of section 236 and other applicable sections of the Immigration and Nationality Act to the same extent as though the alien had been referred to a special inquiry officer by the examining immigration officer; except, that if confidential information, not previously considered in the case, is adduced supporting the exclusion of the alien under paragraph (27), (28), or (29) of section 212 (a) of the Immigration and Nationality Act, the disclosure of which, in the discretion of the special inquiry officer, may be prejudicial to the public interest, safety, or security, the special inquiry officer may again temporarily exclude the alien under the authority of section 235 (c) of the Immigration and Nationality Act and further action shall be taken as provided in this section.

235.51 *Preexamination procedure*—(a) *Action by district director or officer in charge*—(1) *Applicant eligible for permanent residence.* The district director or officer in charge shall cause such investigation of the applicant to be conducted as he deems necessary. If such officer is satisfied (i) that the person is eligible to apply under § 235.5; (ii) that any claim to United States nationality has been established; and (iii) that the person is clearly and beyond a doubt admissible for permanent residence without a visa and passport to the place to which destined, he shall cause to be prepared and issued to such person a Form I-94F and shall note on the reverse side thereof the place and date of the preexamination and the words "Issued under 8 CFR 235.5" followed by the signature of the issuing officer in the space provided. The names and ages of children under 14 may be included in the Form I-94F prepared for an accompanying parent or guardian.

(2) *Applicant eligible for temporary admission only.* The district director or officer in charge shall cause such investigation of the applicant to be conducted as he deems necessary. If the applicant is within the purview of the proviso to section 212 (d)(7) of the Immigration and Nationality Act and is eligible under said Act for temporary admission only, without a visa and passport, the district director or officer in charge shall cause to be prepared and issued to the applicant a complete set of Forms I-94 if he is satisfied that the applicant is clearly and beyond a doubt admissible to the place to which destined. The Forms I-94 shall be noted as provided above for the Form I-94F. The names and ages of children under 14 may be included in the Forms I-94 prepared for an accompanying parent or guardian.

(b) *Action at port of arrival.* If the person to whom a Form I-94 has been issued in accordance with paragraph (a) of this section applies for admission within 30 days of the notation of the preexamining officer and there has been no subsequent change in the person's immigration status, he may be admitted upon identification. Upon admission, the form or forms presented shall be surrendered as provided in § 221.3 of this chapter. If, notwithstanding the determination made on preexamination, the examining immigration officer at the port of entry is not satisfied of the person's admissibility, further action shall be taken as provided in sections 235, 236, and 237 of the Immigration and Nationality Act, this part, and Parts 236 and 237 of this chapter, unless it appears to such examining immigration officer that such person would be *prima-facie* deportable under the Immigration and Nationality Act from that part of the United States or possession of the United States from which he came, in which event an application for a warrant of arrest shall be made, and further proceedings conducted, as provided in Part 242 of this chapter. In such case further action on the application for admission shall be deferred pending disposition of the proceedings under Part 242 of this chapter.

(c) *Aliens not eligible.* If the district director or officer in charge is not satisfied that the alien is eligible for temporary or permanent admission under this section he shall not issue a Form I-94. No appeal shall lie from the decision of the district director or officer in charge refusing issuance of a Form I-94 under this part but such refusal shall be without prejudice to a subsequent application for admission at the place of intended destination.

APPENDIX B.—(1)

Title II—Immigration, Chapter 9—Miscellaneous

POWERS OF IMMIGRATION OFFICERS AND EMPLOYEES

"Sec. 287. (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings,

for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without necessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens.

(b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code.

"(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this Act which would be disclosed by such search."

APPENDIX B.—(2)

8 CFR Part 287—Field Officers; Powers and Duties

Source: §§ 287.1 to 287.4 appear at 17 F. R. 11536, Dec. 19, 1952.

SUBPART A—SUBSTANTIVE PROVISIONS

§ 287.1 *Definitions*—(a) *Reasonable distance from external boundary.* The phrase "within a reasonable distance from any external boundary of the United States", as used in section 287 of the Immigration and Nationality Act, means within a distance of not exceeding 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall

take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided*, That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

(c) *Certain powers of immigration officers.* Any immigration officer is hereby authorized to exercise anywhere in the United States all the powers conferred by section 287 of the Immigration and Nationality Act, including:

(1) The power to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) The power to execute warrants and other processes, to arrest without warrant, to board and search vessels and other conveyances without warrant, and to enter private lands within a distance of twenty-five miles of any external boundary of the United States without warrant to prevent the illegal entry of aliens into the United States;

(3) The power to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the

United States, or concerning any matter which is material or relevant to the enforcement of the Immigration and Nationality Act and the administration of the Service; and

(4) The power to conduct a search, without warrant, of the person, and of the personal effects in the possession of, any person seeking admission to the United States.

(d) *Disposition of felony cases.* The cases of persons arrested for felonies under paragraph (4) of section 287 (a) of the Immigration and Nationality Act shall be handled administratively in accordance with the applicable provisions of § 287.2, but in no case shall there be prejudiced the right of the person arrested to be taken without unnecessary delay before another near-by officer empowered to commit persons charged with offenses against the laws of the United States.

(e) *Power to arrest persons who bring in, transport, or harbor certain aliens, or induce them to enter.* Any immigration officer shall have authority to make arrests for violations of any provision of section 274 of the Immigration and Nationality Act.

(f) *Patrolling the border.* The phrase "patrolling the border to prevent the illegal entry of aliens into the United States" as used in section 287 of the Immigration and Nationality Act means conducting such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States.

(Revised, 18 F. R. 3532, June 19, 1953)

§ 287.2 *Criminal violations; investigation and action.*

Whenever a district director or an officer in charge has reason to believe that there has been a violation punishable under any criminal provision of the laws administered or enforced by the Service, he shall cause an investigation to be made immediately of all the pertinent facts and circumstances and shall take or cause to be taken such further action as the results of such investigation warrant.

§ 287.3 *Disposition of cases of aliens arrested without warrant.* An alien arrested without a warrant of arrest under the authority contained in section 287 (a) (2) of the Immigration and Nationality Act shall be examined as therein provided by an officer other than the arresting officer, unless no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, in which event the arresting officer, if the conduct of such examination is a part of the duties assigned to him, may examine the alien. If such examining officer is satisfied that there is prima facie evidence establishing that the arrested alien was entering or attempting to enter the United States in violation of the immigration laws, he shall refer the case to a special inquiry officer for further inquiry in accordance with Parts 235 and 236 of this chapter or take whatever other action may be appropriate or required under the laws or other regulations applicable to the particular case. If the examining officer is satisfied that there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws, further action in the case shall be taken as provided in Part 242 of this chapter.

§ 287.4 *Subpena.* (a) *Who may issue.* Except as pro-

vided in § 335.11 of this chapter, subpenas requiring the attendance of witnesses or the production of documentary evidence, or both, may be issued upon his own volition by a district director, officer in charge, or special inquiry officer in any proceeding pending before him, or upon application of an officer of the Service, or upon written application of the alien or other party affected. If an alien or other party affected by a proceeding before the Service requests that a witness be subpenaed to testify or to produce books, papers, or documents in such proceeding before the Service, he shall be required as a condition precedent to the issuance of the subpena to state in writing what he expects to prove by such witness or the books, papers, or documents and to show affirmatively that the proposed evidence is relevant and material and that he has made diligent efforts without success to produce the same. Upon determining that a witness whose evidence is desired either by the Service officer or the alien or other party affected will not appear and testify or produce documentary evidence unless commanded to do so and that the testimony and evidence of such witness is essential, the district director, officer in charge, or a special inquiry officer in any proceeding pending before him, shall issue a subpena. If the witness is at a distance of more than 100 miles from the place of hearing, the subpena shall provide for the witness' appearance at the field office nearest to him to respond to oral or written interrogatories, unless the Service indicates that there is no objection to bringing the witness the distance required to enable him to testify in person at the hearing.

(b) *Form.* Every subpena issued under the provisions of this section shall state the title of the proceeding

and shall command the person to whom it is directed to attend and give testimony at a time and place therein specified. A subpena may also command the person to whom it is directed to produce the books, papers or documents designated therein. A subpena may also direct the making of a deposition before an officer of the Service. Subpenas shall be issued on Form I-138.

(c) *Service.* A subpena issued under this section may be served by any person over 18 years of age not a party to the case designated to make such service by the district director or officer in charge having administrative jurisdiction over the office in which the subpena is issued. Service of the subpena shall be made by delivering a copy thereof to the person named therein and by tendering to him the fee for one day's attendance and the mileage allowed by law by the United States District Court for the district in which the testimony is to be taken. When the subpena is issued on behalf of the Service, fee and mileage need not be tendered at the time of service. A record of such service shall be made and attached to the original copy of the subpena.

(d) *Involving aid of court.* If a witness neglects or refuses to appear and testify as directed by the subpena served upon him in accordance with the provisions of this section, the district director issuing the subpena shall request the United States Attorney for the proper district to report such neglect or refusal to the appropriate United States District Court and to request such court to issue an order requiring the witness to appear and testify and to produce the books, papers or documents designated in the subpenas. If the subpena was issued by an officer in charge or a special inquiry officer, the officer is-

suing the subpena shall request the district director having administrative jurisdiction over such officer to take the action referred to in the previous sentence in the event the witness neglects or refuses to appear and testify as directed by the subpena served upon him.

§ 287.5 *Power and authority to administer oaths.* Any immigration officer, or any other employee individually designated by a district director, shall have the power and authority to administer oaths.

(Added, 18 F. R. 6316, Oct. 2, 1953)

SUBPART B—PROCEDURAL AND OTHER NONSUBSTANTIVE PROVISIONS (RESERVED)

APPENDIX C.—(1)

Title III—Nationality and Naturalization, Chapter 2—Nationality through Naturalization

INVESTIGATION OF PETITIONERS; PRELIMINARY EXAMINATIONS ON PETITIONS

"Sec. 335 (a). At any time prior to the holding of the final hearing on a petition for naturalization provided for by section 336 (a), an employee of the Service, or of the United States designated by the Attorney General, shall conduct a personal investigation of the person petitioning for naturalization in the vicinity or vicinities in which such person has maintained his actual place of abode and in the vicinity or vicinities in which such person has been em-

ployed or has engaged in business or work for at least five years immediately preceding the filing of his petition for naturalization. The Attorney General may, in his discretion, waive a personal investigation in an individual case or in such cases or classes of cases as may be designated by him.

"(b) The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make recommendations thereon to such court. For such purposes any such employee so designated is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to administer oaths, including the oath of the petitioner for naturalization and the oaths of petitioner's witnesses to the petition for naturalization, and to require by subpena the attendance and testimony of witnesses, including petitioner, before such employee so designated and the production of relevant books, papers, and documents, and to that end may invoke the aid of any court exercising naturalization jurisdiction as specified in section 310 of this title; and any such court may, in the event of neglect or refusal to respond to a subpena issued by any such employee so designated or refusal to testify before such employee so designated issue an order requiring such person to appear before such employee so designated, produce relevant books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. The record of the preliminary examination authorized by this subsection shall be admissible as evidence in any final hearing con-

ducted by a naturalization court designated in section 310 of this title.

(c) The record of the preliminary examination upon any petition for naturalization may, in the discretion of the Attorney General, be transmitted to the Attorney General and the recommendation with respect thereto of the employee designated to conduct such preliminary examination shall when made also be transmitted to the Attorney General.

(d) The recommendation of the employee designated to conduct any such preliminary examination shall be submitted to the court at the hearing upon the petition and shall include a recommendation that the petition be granted, or denied, or continued, with reasons therefor. In any case in which the recommendation of the Attorney General does not agree with that of the employee designated to conduct such preliminary examination, the recommendations of both such employee and the Attorney General shall be submitted to the court at the hearing upon the petition, and the officer of the Service in attendance at such hearing shall, at the request of the court, present both the views of such employee and those of the Attorney General with respect to such petition to the court. The recommendations of such employee and of the Attorney General shall be accompanied by duplicate lists containing the names of the petitioners classified according to the character of the recommendations, and signed by such employee or the Attorney General, as the case may be. The judge to whom such recommendations are submitted shall, if he approve such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list

when corrected to conform to his conclusions upon such recommendations. One of each such lists shall thereafter be filed permanently of record in such court and the duplicate of each such list shall be sent by the clerk of such court to the Attorney General.

"(e) After the petition for naturalization has been filed in the office of the clerk of court, the petitioner shall not be permitted to withdraw his petition, except with the consent of the Attorney General. In cases where the Attorney General does not consent to withdrawal of the petition, the court shall determine the petition on its merits and enter a final order accordingly. In cases where the petitioner fails to prosecute his petition, the petition shall be decided upon its merits unless the Attorney General moves that the petition be dismissed for lack of prosecution.

"(f) As to each period and place of residence in the State in which the petitioner resides at the time of filing the petition, during the entire period of at least six months immediately preceding the date of filing the petition, there shall be included in the petition for naturalization the affidavits of at least two credible witnesses, citizens of the United States, stating that each has personally known the petitioner to have been a resident at such place for such period, and that the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

"(g) At the hearing on the petition, residence in the State in which the petitioner resides at the time of filing

the petition, for at least six months immediately preceding the date of filing the petition, and the other qualifications required by subsection (a) of section 316 during such residence shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by subsection (f) of this section to be included in the petition. At the hearing, residence and physical presence within the United States during the five-year period required by section 316 (a), but outside the State, or within the State but prior to the six months immediately preceding the date of filing the petition, and the other qualifications required by subsection (a) of section 316 during such period at such places, shall be proved either by depositions taken in accordance with subsection (d) of section 332, or oral testimony, of at least two such witnesses for each place of residence.

"(h) Notwithstanding the provisions of subsections (f) and (g) of this section, the requirements of subsection (a) of section 316 as to the petitioner's residence, good moral character, attachment to the principles of the Constitution of the United States, and disposition toward the good order and happiness of the United States may be established by any evidence satisfactory to the naturalization court in those cases under subsection (b) of section 316 in which the alien has been absent from the United States because of his employment by, or contract with the Government of the United States or an American institution of research, recognized as such by the Attorney General, or employment by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States or a

subsidiary thereof, or employment by a public international organization in which the United States participates.

"(i) (1) A petitioner for naturalization who removes from the jurisdiction of the court in which his petition for naturalization is pending may, at any time thereafter, make application to the court for transfer of the petition to a naturalization court exercising jurisdiction over the petitioner's place of residence, or to any other naturalization court if the petition was not required to be filed in a naturalization court exercising jurisdiction over the petitioner's place of residence: *Provided*, That such transfer shall not be made without the consent of the Attorney General, and of the court to which the petition is transferred.

"(2) Where transfer of the petition is authorized the clerk of court in which the petition was filed shall forward a certified copy of the petition and the original record in the case to the clerk of court to which the petition is transferred, and proceedings on the petition shall thereafter continue as though the petition had originally been filed in the court to which transferred, except that the court to which the petition is transferred may in its discretion require the production of two credible United States citizen witnesses to testify as to the petitioner's qualifications for naturalization since the date of such transfer.".

APPENDIX C.—(2)

8 CFR Part 335—Preliminary Examination on Petitions For Naturalization

Source: §§ 335.11 to 335.13 appear at 17 F. R. 11550, Dec. 19, 1952.

SUBPART A—SUBSTANTIVE PROVISIONS (RESERVED)

SUBPART B—PROCEDURAL AND OTHER NONSUBSTANTIVE PROVISIONS

§ 335.11 *Preliminary examination pursuant to section 335 (b) of the Immigration and Nationality Act*—(a) *When held.* Preliminary examinations shall be open to the public, and shall, where practicable, be held immediately after the petition for naturalization is filed with the clerk of the court unless, in the opinion of the district director or officer in charge, the interests of good administration would be better served by holding such examinations prior to the filing of the petition in the office of the clerk of court, but in no event shall such examinations be held before the petition has been properly executed by the petitioner and his verifying witnesses.

(b) *Conduct of examination.* Preliminary examinations shall be held before an employee of the Service, designated by the district director to conduct such proceedings and to make findings and recommendations thereon to the naturalization court, who shall be known as the "designated examiner." The petitioner and his witnesses and the witnesses produced on behalf of the Government shall be present. The designated examiner shall, prior to the commencement of the examination, make

shown to the petitioner his official capacity and that of any other officer of the Service who may participate in the proceeding. The designated examiner shall have before him the entire record of the preliminary interrogation, including the petitioner's application to file a petition for naturalization (Form N-400) and any other evidence or data that may be relevant or material to the inquiry. All testimony taken at the examination shall be under oath or affirmation administered by the designated examiner. The designated examiner may interrogate the petitioner and witnesses produced in behalf of the petitioner or the Government, and present evidence touching upon the petitioner's admissibility to citizenship. He shall regulate the course of the examination, rule upon applications for the issuance of subpenas and issue such subpenas in proper cases, grant or deny continuances, and rule on all objections to the introduction of evidence, which rulings shall be entered on the record. Evidence held by the designated examiner to be inadmissible shall nevertheless be received into the record subject to the ruling of the court. The petitioner and the Government shall have the right to present such oral or documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts. If the petitioner is not represented by an attorney or representative, the designated examiner shall assist the petitioner in the introduction of all evidence available in his behalf. All documentary or written evidence shall be properly identified and introduced into the record as exhibits by number, unless read into the record.

(c) *Assignment of examining officer at preliminary examination.* The district director or officer in charge

may in his discretion assign an employee of the Service to act as examining officer at the preliminary examination. Such employee shall examine and cross-examine witnesses produced in behalf of the Governmet or the petitioner and present evidence pertinent to the petitioner's admissibility to citizenship. The designated examiner may take such part in the interrogation of the petitioner and witnesses and the introduction of evidence as he may deem necessary.

(d) *Stenographic reporting of proceedings; mechanical recording equipment.* A stenographer shall be in attendance whenever, in the opinion of the designated examiner, such attendance is desirable, and in every case to which an examining officer is assigned. The stenographer shall record verbatim the entire proceedings, including the oaths administered and rulings on objections, but shall not record arguments in support of objections, or statements made off the record with the consent of the petitioner. The stenographer shall certify that the transcribed minutes constitute a complete and accurate record of the examination. Whenever, in the opinion of the designated examiner the use of mechanical recording equipment in lieu of a stenographer is deemed desirable, the proceedings may be recorded by such equipment.

(e) *Issuance of subpenas; attendance and mileage fees.* Subpenas requiring the attendance of witnesses or the production of documentary evidence, or both, may be issued by the designated examiner, upon his own volition or upon written application of the petitioner or his attorney or representative, the examining officer, or the Service. Such written application shall specify, as nearly as may be, the relevance, materiality, and scope of the testimony

or documentary evidence sought and show affirmatively that the testimony or documentary evidence cannot otherwise be produced. Subpenas shall be issued on Form I-133 and due record shall be made of their service. The subpena may be served by any person over 18 years of age, not a party to the case, designated to make such service by the district director or officer in charge. Mileage and fees for witnesses subpenaed under this section shall be paid by the party at whose instance the subpena is issued at rates allowed and under conditions prescribed by the naturalization court in which the petition is pending. Before issuing a subpena the designated examiner may require a deposit of an amount adequate to cover the fees and mileage involved. If the witness subpenaed neglects or refuses to testify or produce documentary evidence as directed by the subpena, the district director or the officer in charge shall request the United States Attorney for the proper district to report such neglect or refusal to any court exercising naturalization jurisdiction and to file a motion in such court for an order directing the witness to appear and testify and to produce the documentary evidence described in the subpena.

(f) *Briefs.* At the conclusion of the preliminary examination the petitioner or his attorney or representative, and the examining officer if one was assigned, may submit briefs in support of arguments made or issues raised at the examination.

(g) *Representation by attorney or representative; absence of representative; advice to petitioner.* The petitioner may be represented by an attorney or a representative who has, where required, been admitted to practice before the Service in accordance with Part 292

of this chapter. If at any stage of the preliminary examination it appears to the designated examiner that he may recommend denial of the petition, or granting thereof with the facts to be presented to the court, he shall advise the petitioner of his right to be represented by an attorney or representative. A continuance of the examination shall be granted upon the petitioner's motion for the purpose of obtaining an attorney or representative. The petitioner's attorney or a representative shall be permitted to be present at all times during the preliminary examination or at any subsequent examinations and the petitioner shall not in any such examination or subsequent examinations be interrogated in the absence of his attorney or representative, unless the petitioner waives such appearance. The attorney or a representative shall be permitted to offer evidence to meet any evidence presented or adduced by the Government or the designated examiner. A petitioner who is not represented by an attorney or a representative shall be entitled to all the benefits and the privileges provided for in this section.

(h) *Designation of Service employees to conduct preliminary examinations.* All employees of the Service who have been designated to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make findings and recommendations thereon to such courts under the provisions of section 333 of the Nationality Act of 1940, as amended, and whose designations are still in force on December 24, 1952, are hereby designated under the provisions of section 335 of the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make findings and recom-

mendations thereon to such courts. Designations under this paragraph and under paragraph (b) of this section shall remain in force until revoked.

§ 335.12 *Recommendations of the designated examiner and the Assistant Commissioner, Examinations Division; notice.* The designated examiner shall, as soon as practicable after conclusion of the preliminary examination, prepare an appropriate recommendation thereon for the court. If the designated examiner is of the opinion (a) that the petition should be denied, or (b) that the petition should be granted but the facts should be presented to the court, he shall prepare a memorandum containing a summary of the evidence adduced at the examination, findings of fact and conclusions of law, and his recommendation as to the final disposition of the petition by the court, and shall before final hearing, in those cases designated by the Assistant Commissioner, Examinations Division, submit the memorandum to him for his views and recommendation. No evidence dehors the record or evidence that would not be admissible in judicial proceedings under recognized rules of evidence shall be considered in the preparation of the memorandum. The Assistant Commissioner shall return the designated examiner's memorandum, the record, and any memorandum prepared by the Assistant Commissioner containing his own views and recommendation for presentation to the court.

(Revised, 19 F. R. 9183, Dec. 24, 1954.)

§ 335.13 *Notice of recommendation of designated examiner.*—(a) *Recommendation that petition be denied.* When the designated examiner proposes to recommend denial of the petition, the petitioner or his attorney or

representative shall be notified thereof, on Form N-425, and furnished a copy of the designated examiner's memorandum. The notice shall be sent by registered mail, with return receipt requested, after any review made by the Assistant Commissioner, Examinations Division, and at least thirty days prior to final hearing. The petitioner shall inform the Service in writing within thirty days from the date of the notice whether he desires a hearing before the court.

(b) *Recommendation that petition be granted.* When the designated examiner proposes to recommend granting of the petition and to present the facts and issues to the court, the petitioner or his attorney or representative shall be notified of the recommendation and furnished a copy of the designated examiner's memorandum prior to the date of the hearing, and after any review made by the Assistant Commissioner.

(c) *Disagreement between recommendations of designated examiner and the Assistant Commissioner, Examinations Division.* In those cases reviewed by the Assistant Commissioner in which his views and recommendation do not agree with those of the designated examiner, the notice required by paragraphs (a) and (b) of this section shall also advise the petitioner of the recommendation of the Assistant Commissioner and that both recommendations will be presented to the court. There shall also be enclosed with such notice a copy of the Assistant Commissioner's memorandum.

(Revised, 19 F. R. 9183, Dec. 24, 1954)

APPENDIX D.—(1)

Title III—Nationality and Naturalization, Chapter 2—Nationality through Naturalization

REVOCATION OF NATURALIZATION

"Sec. 340. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted for contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States Dis-

trict Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

"(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

"(c) If a person who shall have been naturalized after the effective date of this Act shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact

or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

"(d) If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. The diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with statements of the names of those persons within their respective jurisdictions who have been so naturalized and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to revoke and set aside the order admitting to citizenship and to cancel the certificate of naturalization.

"(e) The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the provisions of subsection (a) of section 338 of the Nationality Act of 1940 shall not, where such action takes place after the effective date of this Act, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or been available to a wife or minor child of the naturalized person had such naturalization not been revoked: *Provided*, That this subsection shall not apply in any case in which the revocation and setting aside of the order was the result of actual fraud.

"(f) Any person who claims United States citizenship through the naturalization of a parent or spouse in whose case there is a revocation and setting aside of the order admitting such parent or spouse to citizenship under the provisions of subsection (a) of this section on the ground that the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship which he may have, now has, or may hereafter acquire under and by virtue of such naturalization of such parent or spouse, regardless of whether such person is residing within or without the United States at the time of the revocation and setting aside of the order admitting such parent or spouse to citizenship. Any person who claims United States citizenship through the naturalization of a parent or spouse in whose case there is a revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization under the provisions of subsections (e) or

(d) of this section or under the provisions of section 329 (c) of this title on any ground other than that the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship which would have been enjoyed by such person had there not been a revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization, unless such person is residing in the United States at the time of the revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization.

"(g) When a person shall be convicted under section 1425 of title 18, of the United States Code of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.

"(h) Whenever an order admitting an alien to citizenship shall be revoked and set aside or a certificate of naturalization shall be canceled, or both, as provided in this section, the court in which such judgment or decree is rendered shall make an order canceling such certificate and shall send a certified copy of such order to the Attorney General. In case such certificate was not originally issued by the court making such order, it shall direct the clerk of court in which the order is revoked and set aside to transmit a copy of such order and judgment to the

court out of which such certificate of naturalization shall have been originally issued. It shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of naturalization, if there be any, upon the records and to notify the Attorney General of the entry of such order and of such cancellation. A person holding a certificate of naturalization or citizenship which has been canceled as provided by this section shall upon notice by the court by which the decree of cancellation was made, or by the Attorney General, surrender the same to the Attorney General.

"(i) The provisions of this section shall apply not only to any naturalization granted and certificates of naturalization and citizenship issued under the provisions of this title, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act.

"(j) Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of any naturalization court, by or in which a person has been naturalized, to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing such person, during the term of such court or within the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court to take such action."

APPENDIX D.—(2)

8 CFR Part 340—Revocation of Naturalization

SUBPART A—SUBSTANTIVE PROVISIONS

(RESERVED)

SUBPART B—PROCEDURAL AND OTHER NONSUBSTANTIVE PROVISIONS

§ 340.11 *Investigation and report.* Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.

(Sec. 103, 66 Stat. 173. Interprets or applies secs. 332, 340, 68 Stat. 252, 260) (17 F. R. 11555, Dec. 19, 1952)

APPENDIX E.

U. S. CODE, CONGRESSIONAL AND ADMINISTRATIVE NEWS
Vol. 2, 82nd Congress, 2nd Session, 1952

(Pages 1683 to 1750)

(SYNOPSIS)

ANALYSIS OF THE BILL

TITLE I — GENERAL

1. Definitions (Sec. 101)

2. Diplomatic and Semidiplomatic Immunities (Sec. 102)

3. Powers and Duties of the Attorney General and the Secretary of State (Secs. 103, 104, 105)

"Under section 103, the Attorney General is charged with the primary responsibility for the administration and enforcement of the provisions of the bill except insofar as the bill and all other laws concerned with immigration and naturalization relate to the powers, functions, and duties conferred upon the Secretary of State, the officers of the Department of State, or diplomatic or consular officers. This is in accordance with the President's Reorganization Plan No. 2 of 1950. Provision is made for the delegation by the Attorney General of certain of his duties and powers to employees of the Department of Justice and the Immigration and Naturalization Service."

"Bureau of Security and Consular Affairs.—Section 104 creates a new organizational set-up within the Department

of State to administer the issuance of passports and visas. * * *"

"Section 105 is intended to strengthen security screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States."

TITLE II — IMMIGRATION

1. Admissible Classes of Aliens
   - A. Immigration quotas (secs. 201, 202)
   - B. Allocation of quota numbers (sec. 203)
   - C. Nonquota immigrants (sec. 101 (a) (27))
   - D. Nonimmigrant classes (sec. 101 (a) (15))
2. Excludable Classes of Aliens (Sec. 212)
   - A. Physical and mental defects
   - B. Aliens with criminal records
   - C. Immoral persons
   - D. Stowaways
   - E. Illiterates
   - F. Subversives
   - G. Additional exclusion clauses
   - H. Safeguards for American labor
   - I. Discretionary authority
3. Entry Documents (Secs. 221, 222, 223)

"Sections 221, 222, and 223 provide for the issuance of entry documents. * * *"

4. Entry, Exclusion, and Deportation of Aliens. (Ch. 4 and Sec. 287) (Pages 1709-1710)

A. Inspection

"The provisions relating to the inspection of arriving aliens, contained in chapter 4 of the bill, follow the general pattern of the present law. Every alien arriving at a port of entry must be examined by an immigration officer before he may enter, and such officers are empowered to detain the aliens on board the arriving vessel or at the airport of arrival for observation if suspected of being afflicted with mental or physical defects and may order the temporary removal of the alien for examination and inspection. Medical examinations are to be made by at least one qualified medical officer of the United States Public Health Service or by a qualified civil surgeon.

"In conjunction with their inspection of aliens, the bill authorizes the immigration officers to board and search vessels, aircraft, railway cars or any other conveyance or vehicle in which they believe aliens are being brought into the United States. The immigration officers are empowered to administer oaths, take evidence and make a record, if necessary, concerning the enforcement of the bill with reference to the privilege of any alien to enter, pass through or reside in the United States. Any person coming to the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain, whether or not he intends to remain permanently, whether, if an alien, he intends to become a citizen, and such other information as will aid the immigration officers in determining whether the person is a national of the United States or an alien,

and, if the latter, whether he is subject to exclusion under any of the provisions of the bill. It is not intended by this provision to sanction the indiscriminate questioning or harassment of citizens returning to the United States, but it is to be used by the immigration officers whenever there is reason to believe that a citizen is violating or about to violate the law and is about to become expatriated. Immigration officers are also granted the power to subpena the attendance and testimony of witnesses, and the production of books, papers, and documents in aid of the enforcement of the provisions of the bill. An alien who does not appear, to the examining immigration officer, to be admissible, clearly and beyond a reasonable doubt, shall be detained for further inquiry by a special inquiry officer.

"It is specifically provided in section 235 (b) that an inquiry before a special inquiry officer is not required in the case of an alien crewman or a stowaway. Furthermore, in section 235 (c), it is provided that if in an examination before an immigration officer or a special inquiry officer an alien appears to be excludable under paragraph (27), (28), or (29) of section 212 (a) as an alien whose entry would endanger the public safety or security of the United States or as an alien who is a member of one of the subversive classes of excludables, no further inquiry by a special inquiry officer shall be conducted until the case is reported to the Attorney General together with any such written statement and accompanying information as the alien or his representative may desire to submit in connection therewith. In the latter type of case, the Attorney General may direct an inquiry or a further inquiry, as the case may be, or if he is satisfied that the alien is ex-

cludable on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the interests of the United States, he may, in his discretion, order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer.

"Section 287 of chapter 8 further specifies powers of immigration officers and employees of the Immigration and Naturalization Service. Amendments Nos. 20 and 21 are designed to make a very carefully considered distinction between powers which may be exercised without warrant and such where a warrant will be required."

B. Exclusion and deportation procedures

"The exemption of deportation proceedings from certain of the provisions of the Administrative Procedure Act contained in the Supplemental Appropriation Act, 1951 (Public Law 843, 81st Cong.), is specifically repealed by section 403 (a) (46) of the instant bill. Under sections 101 (b) (4), 236, and 242 (b) special procedures are established for the determination of whether or not an alien is subject to exclusion or deportation, which proceedings are to be conducted before special inquiry officers specially qualified to conduct such proceedings and designated by the Attorney General pursuant to the provisions of the bill. These procedures are made the sole and exclusive ones in such matters."

"A right of appeal to the Attorney General is not provided in the cases of aliens temporarily excluded under section 235 (c). The review procedure described under the heading, 'Inspection,' of this chapter, is in substitution therefor."

"The bill contains detailed and comprehensive provisions relating to the apprehension and deportation of aliens who are within the deportable classes. * * *"

"The provision controlling proceedings for the determination of deportability of an alien are contained in section 242 (b). Deportation proceedings are to be conducted by a special inquiry officer, * * *, who is authorized to administer oaths, to present and receive evidence, and to interrogate, examine, and cross-examine the alien or witnesses. * * *"

"* * * Special inquiry officers have no authority to punish aliens who fail to appear or remain at deportation hearings, through contempt proceedings or otherwise. Orderly administrative processes have at times been interrupted and subjected to unnecessary delays because aliens, without legitimate cause, refused to attend scheduled hearings or insisted upon leaving at their own pleasure and without other than contumacious reasons. The Government should have authority to proceed to a final decision in the face of such obstructionist tactics."

C. Detention and supervision of aliens ordered deported

D. Place to which alien is to be deported

5. Deportable Classes of Aliens (Sec. 241)
6. Adjustment of Status (Secs. 244, 245)
7. Assessment of Detention Expenses
8. Alien Crewmen Controls (Ch. 6)
9. Registration of Aliens (Ch. 7)
10. Penalties (Ch. 8)
11. Miscellaneous

TITLE III—NATIONALITY AND NATURALIZATION

1. Citizens by Birth and by Collective Naturalization
   - A. Citizens by birth
   - B. Citizenship in the territories and possessions
   - C. Children born out of wedlock

2. Nationality through Naturalization
   - A. Jurisdiction to naturalize
   - B. Eligibility to naturalization
   - C. Ineligibility to naturalization

3. Naturalization Procedures
   1. Optional declaration of intention—petition for naturalization
   2. Mandatory neighborhood investigations
   3. Preliminary and final hearings on petitions
   4. Oath of renunciation and allegiance
   5. Fiscal provisions

4. Judicial Revocation of Naturalization

"One of the major changes in existing nationality law provided by the bill is contained in section 340 which authorizes judicial revocation of naturalizaztion. Under the provisions of section 338 of the Nationality Act of 1940, revocation is possible where the naturalization was obtained by fraud or was procured illegally.

"The bill changes the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact or by willful misrepresentation."

5. Loss of Nationality — Other Than By Judicial Revocation

1. Loss of nationality by native-born and naturalized citizens
2. Loss of nationality by naturalized citizens only
   a. Exceptions to the 5-year and the 3-year rules
   b. Loss of nationality by minors
3. Divestiture of foreign nationality

6. Proceedings for Declaration of United States Nationality

TITLE IV — MISCELLANEOUS

(Secs. 401, 402, 403, 404, 405, 406, and 407)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 47

SALVATORE FALCONE AND JOSEPH FALCONE,
Petitioners,

vs.

HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE,

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Matters Involved

Petitioners wish to reply to these aspects of the respondent's argument:

First. The nature of the cases cited by the respondent as authority for enforcing the subpoena. Petitioners contend they are inapplicable as precedent because they deal with utterly different areas of activity and privacy.

Second. The respondent's contention that there are no adversary parties in the administrative investigation. Peti-

tioners say the precise charge and adversary party were determined by and known to the agency but withheld from them.

Argument

I

The respondent's cases for strengthening the administrative subpoena power involve almost uniformly a corporate party resisting the subpoena. The few that involve individual parties called for production of personal business records which merit less protection than testimony. The wide visitorial powers possessed over corporations rob most of these cases of value as precedent. See *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 204-205 where the court noted: ". . . it long has been established that Congress may exercise wide investigative power over them (corporations) analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters." Utterly different is the typical naturalized citizen, rarely alert to the fullness of his rights and ordinarily submissive to show of authority.

The area of investigation involved in such cases is entirely economic activity and the government's role that of a continuing regulatory nature. The validity of the subpoena power varies depending on the proper balance between the private and public interest. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 303. The commission of a fraud at some past time is no vital factor in the welfare of the country. If the naturalized citizen is a present menace, it is most likely that he is committing crimes, subversive or otherwise, for which he can immediately be detained and

punished. No vital public interest requires that an accomplished fraud be pursued otherwise than by normal civil or criminal proceedings commenced on the basis of conventional investigation.

Account must be taken that economic activity and records thereof is an "area of privacy" materially different from the personal status involved in denaturalization. See *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 202: "The subject matter perhaps too often has been generative of heat rather than light, for the border along which the cases lie is one where government intrudes upon different areas of privacy and the history of such intrusions has brought forth some of the stoutest and most effective instances of resistance to excess of governmental authority."

Respondent's authorities are concerned with administrative subpoena powers to which has been attached immunity from prosecution for compulsory testimony. How completely this is true is shown by enumeration in *Shapiro* v. *United States*, 335 U.S. 1, 6-7. Thus before the citizen is led to compromise himself he is rewarded by a pledge of personal safety. No immunity provisions are attached to the Act here involved. In the nature of the subject matter a satisfactory immunity is impossible to achieve, as freedom from criminal prosecution is a paltry consolation if the testimony establishes a basis for lifelong exile. This difficult alternative is avoided if the statute is read to exclude the powers claimed by respondent.

Furthermore, respondent's authorities are concerned almost entirely with production of records. Insofar as the subpoena here required records, petitioners complied. Oral testimony is accorded a higher value and may be protected where records are not. See *Shapiro* v. *United States*, 335 U. S. 1, 27: "Of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege."

II

The respondent blandly asks the Court to assume that there are no parties, as such, to these proceedings, and that therefore no distinctions can be made as to the nominee of an administrative subpoena. This contention seems little more than a polite spoof. The Immigration Officer's affidavit for enforcement alleged petitioners' naturalization was under investigation, the District Court's opinion observed that such an object was frankly stated, and the respondent in this Court states the question to be whether the subpoena may run to the naturalized citizen who is the subject of inquiry. While the government wishes to obtain complete disclosure from the citizen it refuses to concede this is adversary action lest the requirements of notice and opportunity to defend be applied to the most devastating phase of the contest, as they would be if the discovery process were under the judicial supervision of a Sec. 340 proceeding.

Contrasting with this perfect awareness by the Government of the real object and subject of the inquiry is its refusal of explanation to the citizen. The subpoena listed no charges or violation and explanation was flatly refused by the Immigration Officer. In the *Minker* case, the citizen was specifically notified by the District Court's enforcement order and in writing by the Immigration Officer that he was subpoenaed to give testimony in connection with revocation of his own naturalization. In the *Lansky* case (*Lansky* v. *Savoretti*, District Director, 5 Cir., 220 F. 2d 906) the opinion of the Circuit Court states that grounds for denaturalization is a "definite and single issue." No such precision of issue was communicated to petitioners prior to the District Court proceedings. While the issue has now apparently been resolved as a charge of fraud, the sufficiency of

notice is judged as of the time petitioners were summoned to testify. See *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 27: "An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or what it actually succeeds in bringing, to light."

Self-restraint is a characteristic of responsible administrative procedure. Where the real objective of an investigation is clear to the agency and involves possible prosecution, civilized standards call for abstention from compulsory process. Thus compare policy directives of the Internal Revenue Service that process will not be sought to compel testimony from persons the subject of possible criminal prosecution.[1] Similar self-restraint is called for on the part of an agency dealing with the status of a citizen.

Conclusion

Some of the most bitter memories in the struggle for human rights attach to times and practices which compelled a party to furnish proof for his own destruction. Looking backward, on the other hand, to a relatively recent period it is possible to recall rules of law which absolutely forbade

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[1] Internal Revenue Service practice is disclosed in the record in *Beard* v. *United States*, No. 73, October Term, 1955, brief for petitioner, page 9:

". . . Special Agent Kennedy testified at the trial in the District Court as follows (Transcript of Testimony page 681):

"Q. . . . Why didn't you subpoena the records, Mr. Kennedy?

"A. It is my belief personally, it is a matter of law, and it is the policy of the Internal Revenue Service, and it is contained in a directive in the manual of the Intelligence Unit, Internal Revenue Service, that you should never issue process to compel the production of records or the testimony of any individual against whom we contemplate the possibility of recommending criminal prosecution in the future; we would be forcing him to testify against himself and, therefore, anything we got from him would not be admissible against him."

that parties should testify or be called as witnesses. Now abandoned, such rules nevertheless possessed some virtue and their passing was observed with regret by able lawyers on humanitarian grounds. Looking abroad to other lands we can observe legal procedures which emphasize a duty in the citizen to accuse and convict himself. We rightly abhor such denials of human dignity. Absorption with the pursuit of proof has not blinded us entirely to concern for the manner in which it is obtained in criminal cases. Sympathy for the administrative process should not blind us to the illiberial consequences of an unlimited subpoena power in this area of personal status, and illiberal purposes ought not be attributed to Congress where an alternative reading is possible.

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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No. 47

In the Supreme Court of the United States

OCTOBER TERM, 1955

SALVATORE FALCONE AND JOSEPH FALCONE, PETITIONERS

v.

HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

SIMON E. SOBELOFF,
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Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 716

SALVATORE FALCONE AND JOSEPH FALCONE, PETITIONERS

v.

HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

Petitioners seek review of the judgment of the Court of Appeals for the Second Circuit, entered January 10, 1955, petition for rehearing denied February 8, 1955, reversing the judgment of the United States District Court for the Northern District of New York, holding invalid and unauthorized subpoenas issued by an immigration officer

under Section 235(a) of the Immigration and Nationality Act of 1952.

The Court of Appeals has held in this case (Pet. 13-31) that under the subpoena power conferred by Section 235(a) of the Immigration and Nationality Act of 1952, an immigration officer has authority, in the course of an administrative investigation to determine whether good cause exists for the institution of denaturalization proceedings, to subpoena the naturalized citizen who is the subject of the inquiry. That decision, under the title *Application of Barnes*, was referred to by the government in its petition for certiorari in *United States* v. *Minker*, No. 625, this Term, as being in conflict with the decision of the Court of Appeals for the Third Circuit in the *Minker* case, holding that the officer had no such authority. In view of the grant of certiorari in *Minker* on April 11, 1955, the government does not oppose certiorari in this case.

In the *Minker* petition, page 7, footnote 2, we called to the attention of the Court the fact that the same issue was also pending before the Court of Appeals for the Fifth Circuit in *Lansky* v. *Saxoretti*. That court has now decided the issue in accord with the decision of the Second Circuit in the instant case. A copy of its opinion is annexed hereto as an Appendix.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MAY, 1955.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14982

JACK LANSKY, APPELLANT

versus

JOSEPH SAVORETTI, District Director of the United States Immigration and Naturalization Service, Miami, Florida, APPELLEE

and

No. 15277

SYLVIA SHANDLOFF, APPELLANT

versus

JOSEPH SAVORETTI, District Director of the United States Immigration and Naturalization Service, Miami, Florida, APPELLEE

Appeals from the United States District Court for the Southern District of Florida

---

(March 30, 1955.)

Before HUTCHESON, Chief Judge, TUTTLE, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: These appeals, prosecuted, lodged, and argued by the same counsel, are from orders of Judge Holland, United States Dis-

trict Judge for the Southern District of Florida, holding valid and authorized by law subpoenas, issued by an immigration officer, under Section 235 (a) of the Immigration and Nationality Act, of 1952, for the discovery of evidence to support a suit for denaturalization, as provided in Section 340 of the 1952 Act, 8 U.S.C. Sec. 1451.

As was the case in In Re: Barnes, 2nd Cir., ... F.(2). . . .,[1] the question raised by these two appeals is whether Section 235(a)[2] of the Immigration and

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[1] Decided 1-10-55, reversing the decisions of the United States District Courts for the Northern and Southern Districts of New York, reported as In Re: Falcone, 116 Fed. Supp. 464, decided 11-20-53, and In Re: Oddo, 117 Fed. Supp. 223, decided 12-30-53.

[2] "Sec. 235(a) The inspection, other than the physical and mental examination of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he

Nationality Act of 1952 (the McCarran-Walter Act), 66 Stat. 163, 198-9, 8 U.S.C.A., Section 1225 (a), authorizes an officer of the Immigration and Naturalization Service to issue a subpoena requiring a naturalized citizen to testify in an inquiry seeking to determine if "good cause" exists for the commencement of proceedings to revoke the order admitting such person to citizenship.[3]

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intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States, or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpoena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof."

[3] "Sec. 340(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of Section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and

When the brief for appellant Lansky was filed, the decisions of the district courts in the cases of Falcone and Oddo, Note 1, *supra*, holding unauthorized and invalid immigration subpoenas issued as here and in the case of In Re: Minker,[4] holding to the contrary, had not been reversed on appeal. Appellant, therefore, deprecating the Minker decision and relying strongly on the Falcone and Oddo decisions, devoted most of his brief to quotations from them and to the confident assertion of their correctness.

Before the time, however, that the brief in the Shandloff case was due, the Court of Appeals for the Third Circuit, quoting with approval from the decision in the Falcone case, had on the appeal in Minker's case held that the subpoena was unauthorized and invalid and had reversed the district court's decision in the case, but on a very narrow ground.

Stating "Section 235(a) provides that '* * *

---

setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively * * *. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

[4] United States District Court for the Eastern District of Pennsylvania, decided 11-25-53, reported 118 Fed. Supp. 264.

any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before imigration officers * * *", it also makes this power applicable to the obtaining of testimony "concerning any matter which is material and relevant to the enforcement of this act and the administration of the service * * *," the court went on to say: "Certainly the proceeding In Re: Minker was such a matter. The doubtful question is whether Abraham Minker in relation to 'In Re Minker' is a 'witness' within the meaning of Sec. 235(a)."

This question posed, the court, upon reasons which seem to us to be wanting in substance and to run counter not only to the clearly indicated scope and purpose of the act but to its carefully chosen and expressed language, proceeded to hold that the granted power to subpoena witnesses did not support the subpoena of Minker because, and only because, Minker being the party involved in the contemplated denaturalization suit, was not a "witness" within the meaning and intent of the statute. The Shandloff brief, therefore, was directed mainly to quotations from the opinion of the Third Circuit in Minker's case and to acclaiming this succor and assistance from an unexpected quarter as the opinion of a "Daniel come to judgment" and an opinion to end all opinions on the subject.

Unfortunately for both appellants, however, by the time for filing appellee's brief in this court, the Court of Appeals for the Second Circuit had

written its opinion in In Re: Barnes, reversing the district court decisions in the Falcone and Oddo cases, and in effect agreeing with the decision of the district court and disagreeing with that of the Court of Appeals for the Third Circuit in In Re: Minker.

When, then, the matter comes to us for decision, the moving fingers in the Second and Third Circuit have ceased to write, decision making there has apparently come to an end, and we are presented with a *fait juridique* and with a clear choice of aligning ourselves with the Third or with the Second Circuit, or with neither.

So circumstanced, we do not hesitate to declare that we regard the reasoning and decision of the Third Circuit in the Minker case as too narrowly based and as without support in the plain language of the statute under the applicable principles of statutory construction. No mention is made in the opinion of, no attention is paid to, the broad policy considerations plainly to be seen on the face of the Immigration and Nationality Act of 1952, no effect is accorded to the general purpose manifested in both the language and the history of the act. There is only, with deference, a quite dry as dust and brittle interpretation of a single word in a broadly comprehensive act, with the effect of greatly impairing its scope and efficiency and the further effect of defeating its underlying purpose, to discover those who have taken false advantage of the naturalization privilege and to deprive them of the fruits of their fraud.

On the other hand, we find ourselves in accord not only with the conclusion announced in the opinion of the Court of Appeals for the Second Circuit but, generally speaking, with the reasons given in that opinion. The district judge in the Minker case correctly pointed out that it is a far cry in time and a farther one in substance from the days of administrative exuberance,[5] to put it mildly, and from *Jones* v. *Securities and Exchange Commission*, 298 U.S. 1, with its organlike denunciations of, and *Morgan* v. *U.S.*, 298 U.S. 468, with its milder preachments against, administrative usurpation and absolutism, to the decision in *United States* v. *Morton Salt Co.*, 338 U.S. 632, and to the present, when the Administrative Procedure Act,[6] 5 U.S.C. 1005,[7] and the decisions giving it effect, have brought substantially all administrative actions and their review within the compass of the Administro-Judicial Process.[8]

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[5] Cf. "Judging as Administration, Administration as Judging", Texas Law Review, Nov., 1942. Vol. 21.

[6] Cf. "New Instruments of Public Power," Alexander F. Morrison Lectureship Foundation, Proceedings of the 1946 Annual Meeting, California State Bar.

[7] "An act to improve the administration of justice by prescribing fair administrative procedure," Chapt. 324, Public Law 404, Laws of the 79th Congress, Second Session 1946.

[8] "An administro-judicial process, beginning with administrative adjudication of the facts and ending with a judicial adjudication of the law, both as completely aspects of one adjudicative process as are the adjudication of the facts by trial judge or jury and the adjudication of the law on appeal." Judging as Administration, Administration as Judging, note 5, supra.

Cf. "Under such statutes, this court does not function as a tribunal, exterior to the statutory administrative scheme,

Taking the statute up, then, to consider it with the view to determining its reach and scope, and considering it as a fully integrated act, we think it may not be doubted that the fear of administrative abuse of power is not a sufficient basis for limiting, within the narrow confines proposed by appellant, the generality and comprehensiveness of the language employed to grant the power claimed and exerted here. We think that, construing the statute under the ordinary canons of statutory construction, it cannot be successfully claimed, that subpoena power is lacking, and that the judgment of the district court affirming the exercise of that power was wrong.

As to the secondary point in the case, that the subpoena is too broad and that its exercise may be oppressive and, therefore, unconstitutional, it is sufficient to say that this defense falls with the general defense of want of power. For there is nothing in the subpoena which authorizes it to, or indicates that it will, be oppressively exerted. Certainly it cannot be claimed that it is a mere fishing expedition for it is directed to reaching, and seeks only to reach, evidence in connection with a definite and single issue, whether grounds exist to support a claim for denaturalization. As pointed out

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whose jurisdiction is invoked on constitutional grounds, to protect the applicant against the failure of the statute to provide due process. It functions as the tribunal of last resort, set up in the statute itself for the correction of errors of law committed, and not corrected, in the course of the administrative procedure. * *" Leebern v. U.S., 124 Fed(2) at 507; U.S. v. Morgan, 307 U.S. at page 191.

in the Barnes case and in the many cases we, and other courts, have written in connection with the use and abuse of the subpoena power, the issuance of the subpoena is but a step in the inquiry. Neither the issuance of, nor compliance with, it in any manner takes away or impairs the constitutional rights of the person to be examined. If at any time during the examination the person subpoenaed feels or fears that his constitutional rights are being, or will be invaded by particular questions, he has the right to stand upon them and to invoke the protection of the courts.

In no doubt that the questions presented in these appeals were correctly answered by the court below, we affirm his judgments. AFFIRMED.

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[9] N.L.R.B. v. Anchor Rome Mills, Inc., 197 F(2) 447; Jackson Packing Co. v. N.L.R.B., 204 F(2) 842; N.L.R.B. v. Barrett, 120 F(2) at 586.

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No. 47

In the Supreme Court of the United States

OCTOBER TERM, 1955

SALVATORE FALCONE AND JOSEPH FALCONE,
PETITIONERS

v.

HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 47

SALVATORE FALCONE AND JOSEPH FALCONE,
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HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 40–54) is reported at 219 F. 2d 137. The memorandum opinion of the District Court (R. 26–35) is reported at 116 F. Supp. 464.

JURISDICTION

The judgments of the Court of Appeals were entered on January 10, 1955 (R. 54, 55), and a petition for rehearing was denied on February 8, 1955 (R. 55–56). The petition for a writ of certiorari was filed on April 12, 1955, and was

granted on May 16, 1955 (R. 56; 349 U. S. 927). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under the subpoena power conferred by Section 235 (a) of the Immigration and Nationality Act of 1952, an immigration officer, in the course of an administrative investigation to determine whether good cause exists for the institution of denaturalization proceedings, may subpoena the naturalized citizen who is the subject of the inquiry.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U. S. C. 1101 *et seq.*, and the regulations of the Immigration and Naturalization Service are set forth as an Appendix to the Government's brief in *United States* v. *Minker*, No. 35, this Term, at pp. 50–60.

STATEMENT

Petitioners seek reversal of the judgment of the Court of Appeals and the reinstatement of two orders of the District Court which denied the application of the Officer in Charge of the Syracuse office of the Immigration and Naturalization Service to secure compliance with administrative subpoenas. The subpoenas had been issued by the Service pursuant to Section 235

(a) of the Immigration and Nationality Act in connection with an investigation (under 8 C. F. R. 340.11) into whether good cause existed for the institution of judicial proceedings under Section 340 (a) of the Act to revoke petitioners' naturalization. The facts pertinent to the issues raised may be summarized as follows:

In April 1953, the Officer in Charge of the office of the Immigration and Naturalization Service in Syracuse, New York, addressed a letter to petitioner Joseph Falcone requesting that he appear in his office for an interview in connection with an official matter (R. 12, 26–27). About the same time petitioner Salvatore Falcone, who was in Miami, Florida, was asked to appear for an interview by officials of the Miami office of the Immigration and Naturalization Service (R. 22). Both voluntarily appeared for their respective interviews. Petitioner Joseph Falcone, however, refused to answer any questions asked him by the immigration officer. Petitioner Salvatore, on being asked to explain the reason for the use of the name "Projelto" by his parents when they entered this country in 1925, replied that he had no explanation, that his mother and father were dead, and that he had always used and was known by the name of Falcone (R. 27).

Following these interviews, on June 18, 1953, a subpoena was issued, signed by an acting officer in charge of the Syracuse office, requiring that

petitioner Joseph Falcone appear in the Syracuse office on June 23, 1953, and give testimony in a matter entitled "In re Joseph Falcone" pursuant to Section 235 (a) of the Immigration and Nationality Act (R. 5, 13). On June 30, 1953, a similar subpoena signed by the officer in charge of the Syracuse office was issued against petitioner Salvatore Falcone at an address in Utica, New York, requiring him to appear on July 3, 1953, in connection with a matter captioned "In re Salvatore Falcone", also pursuant to Section 235 (a) of the Immigration and Nationality Act. Both subpoenas required that each of the petitioners bring with him "evidence of your birth and of your original entry into the United States, and your naturalization certificate" (R. 13, 20).

Each petitioner appeared before an immigration officer in the Federal Building in Syracuse, New York, at the time designated in his subpoena, bringing with him his birth certificate and certificate of naturalization. Each refused, however, either to be sworn or to testify (R. 21–24, 27). Counsel for petitioners stated that their objection to compliance with the subpoena was that Section 235 (a) applies only where aliens are concerned and does not authorize the Service to subpoena citizens (R. 22–24).

Thereafter, on September 9, 1953, the United States Attorney applied for and was granted an order to show cause directed to each of the petitioners, returnable on or before September 21, 1953

(R. 1, 2). In an affidavit in support of the submitted order, the officer in charge of the Syracuse office stated that his office was required by regulation (8 C. F. R. 340.11) to cause an investigation to be made where it appeared that an order admitting a person to citizenship had been procured by concealment of a material fact or by willful misrepresentation; that investigations into the legality of the naturalization proceedings of both petitioners were then in progress; that a subpoena had been issued pursuant to Section 235 (a) of the Immigration and Nationality Act to each petitioner requiring his testimony in connection with this investigation; and that, while they had produced the naturalization documents called for, both had declined to testify under oath as required (R. 3–4). Counsel for petitioners thereupon filed a notice to set aside each of the subpoenas, with affidavits alleging, *inter alia*, that the Service had no authority under Section 235 (a) of the Immigration and Nationality Act to subpoena citizens, and that this section gives the Service jurisdiction only to question aliens (R. 7–11, 14–19).

After a hearing on September 21, 1953, the District Court denied the application of the Officer in Charge of the Immigration and Naturalization Service for an order of compliance as to each petitioner (R. 35–37).

On appeal, the judgment was reversed (R. 54). The Court of Appeals noted that Section 235 (a) of the Act broadened the investigative subpoena power (theretofore granted by Section 16 of the Immigration Act of 1917, 39 Stat. 885, 8 U. S. C., 1946 ed., 152) so as now to empower designated officers of the Service ("undisputedly including those who issued the subpoenas in these cases", R. 45) not only to use subpoenas in investigations "relating to the privilege of any person to enter, reenter, pass through, or reside in the United States" but also "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service." The court concluded (R. 46):

> * * * Surely investigations of an administrative character, conducted by the very officials who by training and experience have expert knowledge of the whole subject of immigration and naturalization, and designed not merely to procure evidence to support a denaturalization proceeding under Section 340 of the Act, but to ascertain the true facts and in many if not most cases, exonerate those under investigation, are "concerning * * * matter which is material and relevant to the enforcement" of the Act. * * *

SUMMARY OF ARGUMENT

This case involves the same question as, and is to be heard with, *United States* v. *Minker*, No. 35.

Incorporating by reference our brief in that case, we supplement it here with discussion of specific points raised by the petitioners.

I

In their effort to avoid the conclusion compelled by the plain language and history of Section 235 (a) of the Immigration and Nationality Act—that the subpoena power is available for administrative investigations to determine whether there is "good cause" for a denaturalization proceeding, since this is a "matter which is material and relevant to the enforcement of this Act"—petitioners argue (1) that such a construction would render meaningless the grant of investigative powers under Sections 236 (a), 242 (b), 287, 335 (b), and 336 (d), and (2) that the Attorney General's regulations reflect a belief that no such power exists. The cited statutory provisions and the pertinent regulations reveal that both contentions are clearly erroneous.

1. Four of the five sections of the Act upon which petitioners rely—236 (a), 242 (b), 287, and 336 (d)—make no provision for administrative subpoenas. Far from supporting the view that redundancy would result from construing the subpoena provision of Section 235 (a) in accordance with the broad language Congress deliberately added, these sections reinforce the propriety of such a construction.

Section 335 (b), dealing with preliminary examinations upon petitions for naturalization, does contain a provision of its own for subpoenas in connection with such examinations. This separate provision has existed in the nationality laws since 1926, alongside the subpoena provision in the immigration laws from which the broadened language of Section 235 (a) derives. The unique character of the preliminary examination, where the examiner functions as an officer of the court and takes testimony which is frequently accepted by the court in lieu of further appearance by the witnesses, makes this an appropriate subject for detailed treatment by itself. See *Bindczyck* v. *Finucane*, 342 U. S. 76, 81, fn. 5. These factors—the separate derivation and the special nature of preliminary examinations—divest of force the argument that 235 (a) and 335 (b) are redundant if the former is read as it was written. Like the statute, the regulations (see 8 C. F. R. 287.4 (a) and 335.11) treat preliminary examinations separately. There is no overlap which could possibly be significant here, and thus no reason to find in this arrangement a ground for denying the power to subpoena in denaturalization investigations.

2. The Attorney General's regulations deal comprehensively with the general subpoena power. 8 C. F. R. 287.4. Thus petitioners are mistaken in their belief (Pet. Br. 37) that the regulations are silent on this subject. The fact that the regulations are numbered under Section 287, dealing

generally with the powers of immigration officers rather than under Section 235 is, of course, insignificant, and petitioners, having overlooked the pertinent regulations altogether, make no contrary argument. Such an argument would be "frivolous" in any event. *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326, 338. As anybody would who reads the statute, Congress recognized that Sections 287 and 235 must be considered together to determine the sum of the powers of immigration officers. H. Rep. No. 1365, 82d Cong., 2d Sess., p. 55. The regulations merely combine the two in placing the subpoena power under 287, expressly citing Section 235 of the statute as authority.

II

Petitioners erroneously assert an inconsistency between administrative inquiry, implemented by the subpoena power, and the fact that the Act provides in Section 340 (a) a judicial procedure for revocation of naturalization unlawfully obtained. Investigation by the executive to determine whether there is good cause for a judicial proceeding is perfectly compatible with and necessary to the power and duty to bring appropriate actions in court. *E. g., United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–643; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 201. And, as our *Minker* brief shows (pp. 21–28), this investigative function has long been performed by the Immigration Service with respect to the duty

to bring denaturalization proceedings where there is "good cause" therefor.

There is no merit in the broad contention that enforcement of the subpoenas in this case would violate petitioners' right of privacy. As they concede (Pet. Br. 35), pretrial examination would be available in a denaturalization proceeding under Section 340 (a). Cf. *United States* v. *Costello*, 222 F. 2d 656 (C. A. 2), pending on petition for certiorari, No. 155, this Term. And subpoenas under Section 235 (a) are enforceable only by judicial order. There is no constitutional difference between the two procedures insofar as the claimed "right of privacy" is concerned.

The decisive point in this case is that petitioners have no blanket freedom from legitimate government inquiry—a point established by the many cases, reviewed in our *Minker* brief (pp. 35–37, 40–43), enforcing the administrative subpoena power for investigations of facts which may lead to civil or criminal actions in court. This is not to deny that petitioners might claim privilege or raise other objections to specific inquiries. But no such question is here; petitioners have simply denied the power to subpoena them at all. *United States* v. *Murdock*, 284 U. S. 141, 148; *Brown* v. *United States*, 276 U. S. 134, 144.

Similarly, the suggestion that the subpoena power may be abused is no objection to enforcement in this case, where there has been no abuse. The administrative regulations carefully restrict

the occasions and the scope of inquiries into possible naturalization frauds. If the restrictions are exceeded, the courts are empowered to correct the errors as they arise. But the administrative power Congress conferred is not to be denied on the supposition that it may at some time be misused.

ARGUMENT

In our brief in *United States* v. *Minker*, No. 35, this Term, which presents the same problem and will be heard together with this case, we have dealt with the principal contentions urged by these petitioners. Accordingly, we incorporate by reference our brief in the *Minker* case, and undertake here to amplify our position in response to certain points discussed by petitioners.

I

PETITIONERS' ATTEMPT TO LIMIT THE PLAIN LANGUAGE OF SECTION 235 (a) IS SUPPORTED BY NEITHER THE TEXTUAL ANALYSIS THEY PROPOSE NOR THEIR ERRONEOUS ASSERTION THAT THE ADMINISTRATIVE REGULATIONS ARE SILENT ON THE SUBPOENA POWER

As shown in the Government's brief in *United States* v. *Minker* (pp. 11–29), the literal terms of Section 235 (a) of the Immigration and Nationality Act, empowering the Attorney General and any immigration officer to subpoena witnesses for testimony "concerning any matter which is material and relevant to the enforcement of this Act",

plainly provide for subpoenas to be used in the investigation of possible grounds for denaturalization. We demonstrated there (pp. 17 *et seq.*) that the legislative history, revealing the purposeful addition of the quoted language to expand the subpoena power as it had formerly existed, powerfully reinforced the conclusion which flowed directly from the language itself. And we undertook to show (pp. 30–49) that the Third Circuit had erred when, after agreeing with the foregoing broad proposition, it held that the "witnesses" for whom subpoenas under Section 235 (a) are authorized could only be others than the person whose naturalization was under investigation. We rely upon our discussion in the *Minker* brief, without more, to answer the contentions here (1) that the subpoena power reaches *citizens* only to the extent that persons claiming to be citizens may be seeking admission to the United States (Pet. Br. 24–28), or, alternatively, (2) that the petitioners' submission of evidence that they had been naturalized ended the power to interrogate them (Pet. Br. 29–32). In our view, these contentions read unfounded limitations into the statute as Congress wrote it and as its background shows it was intended to operate.

We turn to a fuller discussion of two further arguments. First, it is asserted that if the subpoena power in Section 235 (a) is applied generally according to its terms, and thus held avail-

able for denaturalization investigations—as the Second, Third, and Fifth Circuits have all agreed it should be[1]—it renders superfluous the grant of "investigatory powers in Sections 236 (a), 242 (b), 287, 335 (b), and 336 (d)" (Pet. Br. 36). Second, petitioners state that the Attorney General omitted from his regulations any description of the subpoena power he claims under Section 235 (a), thus reflecting an authoritative belief that no such power exists (Pet. Br. 37). The first argument is refuted by the very provisions petitioners cite; these show that, far from being redundant, the general grant of the subpoena power in Section 235 (a) is appropriate and necessary for the investigative and adjudicative functions defined elsewhere in the Act. The second argument is simply mistaken in fact; the regulations (8 C. F. R. 287.4) actually do spell out the subpoena power, explicitly relying upon Section 235 (a) as authority.

1. Four of the five sections petitioners cite for their view that the subpoena power under Section 235 (a) would be merely a duplication if defined in accordance with the general statutory terms contain no provisions at all, in themselves, for

[1] As pointed out above and in our *Minker* brief (pp. 9–10), the Third Circuit in that case, the Second Circuit in this, and the Fifth Circuit in *Lansky* v. *Saccoretti*, 220 F. 2d 906, pending on petition for certiorari, No. 100, this Term, all conclude that subpoenas are authorized by Section 235 (a) for denaturalization investigations.

administrative subpoenas. Examination of these sections—236 (a), 242 (b), 287, and 336 (d)—actually lends further support to our view that Section 235 (a) should have the application its language requires, since the first two present obvious occasions for the administrative use of subpoenas and neither these, the remaining two, nor any others supply this need except as it is met by the sufficient language of Section 235 (a). The remaining provision, Section 335 (b), does reenact the statutory power which formerly existed for the use of subpoenas in the particular circumstances of preliminary examinations upon petitions for naturalization. But the continuation of this special provision affords no basis for excising the deliberate addition which was made when Section 235 (a) reenacted and broadened the subpoena power formerly contained in Section 16 of the Immigration Act of 1917 (see the Government's brief in *Minker*, pp. 16–17).

a. Section 235 (a) is the *only* provision in the Act which applies to "investigations" as distinguished from the more formal proceedings elsewhere provided in the Act. Whether it is felt that a particular investigation may give rise to future deportation proceedings,* or to cancella-

* Investigations to determine whether grounds exist to warrant the institution of a formal deportation proceeding are controlled by 8 C. F. R. 242.11, which provides in part:

"*Investigations.*—(a) *Persons believed to be subject to deportation.* The case of every person believed to be

tion proceedings, or even to the institution of criminal charges,[4] the authority to issue a subpoena for preliminary investigative purposes derives from Section 235 (a). For these investigative activities concern matters "material and relevant to the enforcement of this Act" within

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subject to arrest and deportation shall be investigated by such officer as may be designated for that purpose.

(b) *Purpose of investigation.* The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably establishing that the person investigated is an alien and that he is subject to deportation.

Section 235 (a), like the section from which it was derived in the Immigration Act of 1917 (Sec. 16, c. 29, 39 Stat. 885), has been held to authorize the use of a subpoena in connection with such preliminary investigations. *Vivian* v. *United States*, 224 F. 2d 53 (C. A. 7), pending on petition for a writ of certiorari, No. 322, this Term. See also *Azzollini* v. *Watkins*, 172 F. 2d 897, 899 (C. A. 2); *Graham* v. *United States*, 99 F. 2d 746, 748–749 (C. A. 9); *In re Estes*, 87 F. Supp. 461 (N. D. Texas), reversed on other grounds *sub nom. Estes* v. *Potter*, 183 F. 2d 865 (C. A. 5), certiorari denied, 340 U. S. 920; *Immigration Manual* (Govt. Printing Office, 1946), pp. 9073–78.

[4] See 8 C. F. R. 340.11, set forth at pp. 59–60, Brief for United States, *United States* v. *Minker*, No. 35.

[5] 8 C. F. R. 287.2 provides:

Criminal violations; investigation and action. Whenever a district director or an officer in charge has reason to believe that there has been a violation punishable under any criminal provision of the laws administered or enforced by the Service, he shall cause an investigation to be made immediately of all the pertinent facts and circumstances and shall take or cause to be taken such further action as the results of such investigation warrant.

the plain terms of Section 235 (a). And precisely such a matter is involved here. Since, as shown in the Government's *Minker* brief (pp. 21–29), investigations to determine whether denaturalization proceedings should be brought have long been a familiar function of the Immigration and Naturalization Service, the subpoena provisions of Section 235 (a) apply.

Moreover, the provisions petitioners cite, relating to administrative hearings, not only fail to support petitioners' denial of the subpoena power for *investigative* purposes, but actually show that Section 235 (a) is even the source of the subpoena power essential to *adjudicative* proceedings. Section 236 (a) sets out the procedure for formal hearings in exclusion cases. It contains no provision in itself for subpoenas, but specifically provides that the applicable provisions of Section 235 shall pertain. Thus, there is no such "reiteration" as petitioners suggest (Pet. Br. 36); instead, it is clear that the subpoena power for proceedings under Section 236 (a) derives solely from the general provisions of Section 235 (a).

Similarly, neither Section 242 (b), dealing with deportation proceedings, Section 287, describing the general powers of immigration officers and employees, nor Section 336 (d), providing for the Attorney General's participation in naturalization proceedings, contains any separate grant of the subpoena power. It is difficult to perceive,

therefore, where there is basis for arguing (Pet. Br. 36–37) that application of the general subpoena power under Section 235 (a) would render any of these other provisions "duplicitous" or "meaningless." To the contrary, Section 235 (a) grants power to issue subpoenas which would otherwise be lacking—serving, for example, to authorize such action in deportation investigations and in deportation hearings under Section 242 (b). See *United States* v. *Vivian*, 224 F. 2d 53 (C. A. 7), pending on petition for certiorari, No. 322, this Term. That Congress intended the subpoena power under Section 235 (a) to apply to formal administrative hearings as well as investigations seems clear from the fact that the power was granted generally to the "Attorney General and any immigration officer, including special inquiry officers"—as distinguished from Section 16 of the 1917 Act (39 Stat. 885, 8 U. S. C., 1946 ed., 152), which gave the power only to a "district director" or "inspector in charge", and referred merely to "investigations" as the occasions for exercising the power. This change is to be read with the provisions of the 1952 Act (1) defining a "special inquiry officer" as any immigration officer designated by the Attorney General, on the basis of special qualifications, "to conduct specified classes of proceedings" (Section 101 (b) (4)), and (2) forbidding any such officer to exercise this hearing and adjudicating function in any case where he has

participated in investigative or prosecuting functions (Sections 236 (a) and 242 (b)). Cf. *Marcello* v. *Bonds*, 349 U. S. 302, 305; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41–47.

While it is thus apparent that Section 235 (a) authorizes subpoenas for adjudicative as well as investigative purposes, it bears emphasis that the discussion in this case need not reach even this point. The still more obvious proposition which answers petitioners' argument is simply that the provisions for hearing and investigation to which they refer, with the special and narrow exception discussed immediately below, make no separate grant of the subpoena power at all, and so present no problem of redundancy if the subpoena provision in Section 235 (a) is given the full effect its language and history require.[5]

b. The remaining provision petitioners cite, Section 335 (b), adds nothing to their argument. Section 335 (b) deals with preliminary examinations on petitions for naturalization, and does provide for subpoenas to be issued in such proceedings. However, this special provision is merely a substantial reenactment of Section

[5] As we have observed, Section 287 is one of the provisions petitioners invoke in this connection though, like the others already discussed, it contains no grant of the subpoena power. Section 287 (b) does reiterate the oath administering authority conferred in Section 235 (a), but adds a penalty for perjury which is not prescribed in the latter. As to subpoenas, on the other hand, Section 235 (a) makes the only provision and spells out the method of enforcement in the courts.

333 (a) of the Nationality Act of 1940 (54 Stat. 1137, 1156), as amended (8 U. S. C., 1946 ed., Supp. V, 733 (a)), whereas Section 235 (a) derives from Section 16 of the Immigration Act of 1917 (39 Stat. 874, 885, 8 U. S. C., 1946 ed., 152). The separate origins of the two sections and the traditionally unique character of the preliminary naturalization examination as an adjunct of the court proceeding to which it relates leave no realistic basis for arguing that Section 235 (a) must be truncated to avoid overlap with 335 (b).

The continuation in the 1952 Act—and in the regulations thereunder (*infra*, p. 21)—of a separate provision detailing the powers and duties of naturalization examiners reflects a traditional statutory arrangement under which such examiners have functioned as officers of the naturalization court rather than purely executive officers. See *Bindczyck* v. *Finucane*, 342 U. S. 76, 81, fn. 5. Indeed, when provision for this function was first made, these officers were appointed by a federal district judge for the district in which the naturalization proceeding was pending "to conduct preliminary hearings upon petitions for naturalition to such court, and to make findings and recommendations thereon." Act of June 8, 1926, c. 502, 44 Stat. 709. In language identical in material respects with that now appearing in Section 335 (b) of the 1952 Act, this original provision empowered the examiner "to subpoena witnesses, and to administer oaths, including the

oath of the petitioner to his petition and the oath of his witnesses." Although provision was made in 1940 for appointment of naturalization examiners by the Commissioner or a Deputy Commissioner, their function as officers of the court remained the same (*Nationality Manual* (Govt. Printing Office, 1944), p. 8061), and the same provision for subpoenas was reenacted. Nationality Act of 1940, Sec. 333 (a), 54 Stat. 1137, 1156. The statute remained in this form, without any change pertinent here, until the Immigration and Nationality Act of 1952 was enacted. In Section 335 (b), the 1952 Act simply carried forward these provisions for preliminary examination and for the issuance of subpoenas incident thereto. See H. Rep. No. 1365, 82d Cong., 2d Sess., pp. 279–281.

Section 235 (a) of the 1952 Act derives, on the other hand, from Section 16 of the Immigration Act of 1917. See H. Rep. No. 1365, 82d Cong., 2d Sess., pp. 164–166. Throughout the years when the separate provision for subpoenas by preliminary examiners was in force, Section 16 was also in force. And in the 1952 Act, Section 235 (a) became the broadened successor of former Section 16, while the separate provision for preliminary examiners was continued in Section 335 (b).

This brief sketch of the separate origins defeats the effort to show that Section 235 (a) could justifiably be emasculated to avoid any supposed

duplication in Section 335 (b). It may be that, had the provisions evolved differently, all references to subpoenas would have been bundled into 235 (a), eliminating the specific authorization for the specific purposes of 335 (b). Even this is doubtful, however, bearing in mind the special character of the preliminary naturalization examiner, whose role is like that of a special master in equity, and who receives testimony which may be and often is accepted by the court in lieu of another appearance by the witnesses. See *Bindczyck* v. *Finucane*, 342 U. S. 76, 81, fn. 5; 8 C. F. R. 335b.1 (d). It is to be noted, moreover, that the administrative regulations, like the statute, deal separately with the special subject of preliminary examinations, including the separate grant of the subpoena power for this purpose. See 8 C. F. R. 335.11 generally, and subsection (e), relating to subpoenas; also, 8 C. F. R. 287.4 (a), outlining the subpoena power generally, "[e]xcept as provided in § 335.11 * * *" (*infra*, pp. 22–24).

The significant point here, at any rate, is not whether Sections 235 (a) and 335 (b) could now be read as overlapping. All that matters for present purposes is that the separate evolution of these provisions fully explains their separate character, and answers the suggestion that the broad language of Section 235 (a) should be read out of the statute to avoid any suggestion of duplication with another provision having no relation to the investigative function here involved.

2. Contrary to the assertion (Pet. Br. 37) that the administrative regulations are silent on the subpoena power conferred by Section 235 (a), the matter is explicitly dealt with in 8 C. F. R. 287.4, which provides in pertinent part:

> *Subpena*—(a) *Who may issue.* Except as provided in § 335.11 of this chapter, subpenas requiring the attendance of witnesses or the production of documentary evidence, or both, may be issued upon his own volition by a district director, officer in charge, or special inquiry officer in any proceeding pending before him, or upon application of an officer of the Service, or upon written application of the alien or other party affected:

While this provision is numbered under Section 287, which deals generally with the powers (other than the subpoena power) of immigration officers, Part 287 of the regulations specifically includes Section 235 of the Act in the "Authority" cited for its issuance. 8 C. F. R., p. 140; and see 8 C. F. R., 1954 Supp., 9.5a, dealing with the authority of regional commissioners and providing, in subsection (kk), that such commissioners shall have the powers of officers of the Service with respect to issuance of subpoenas "as provided in section 235 (a) of the Immigration and Nationality Act and Part 287 of this chapter."

It would have been clear, moreover, even without this explicit citation, that Section 235 (a) is the only statutory basis upon which the gen-

eral subpoena provisions in Part 287 of the regulations could have been predicated. It may be that the regulations are in this respect more symmetrical than the statute, bringing together the general provisions which define the powers of immigration officers. The point of importance here, however, is that petitioners have overlooked the provision in the regulations unmistakably asserting and prescribing the exercise of the subpoena power granted in Section 235 (a) of the Act. And the difference in numbering is, of course, without significance. It is noteworthy in this connection that the House Judiciary Committee included in its discussion of Section 235 the observation that "Section 287 * * * further specifies powers of immigration officers and employees of the Immigration and Naturalization Service". H. Rep. No. 1365, 82d Cong., 2d Sess., p. 55. But even apart from this confirmation of the propriety of reading and administering Sections 235 and 287 together, it would be "frivolous" here, as it was in *Textile Mills Corp.* v. *Commissioner*, 314 U. S. 326, 338, to argue that the regulation may be ignored "because it was not specifically incorporated under" the statutory section it implements—particularly where that section is expressly referred to in the regulation and is the only appropriate basis therefor.[6]

[6] To be sure, petitioners undertake no such argument. Instead, they wholly overlook 8 C. F. R. 287.4 and proceed on the apparent assumption that there is no regulation at all dealing with the subpoena power.

It is equally unimportant that, like the statute, the regulation makes no specific reference to denaturalization investigations, or to any other particular "matter which is material and relevant to the enforcement of this Act * * *." The subpoena power is in both instances defined generally and is available for all such matters. Further particularization, instead of helping, might only have served as occasion for arguments like petitioners'—that specific subjects not mentioned were not covered. Here, there is no proper basis for such a contention. It is enough that the broad language of both statute and regulation—especially when read against the legislative history and administrative background reviewed in our *Minker* brief (pp. 17–29)—plainly reach the important "matter" of possible fraud in the procurement of naturalization.

II

THE SUBPOENA POWER IS NECESSARY AND PROPER FOR PERFORMANCE BY THE ATTORNEY GENERAL AND THE IMMIGRATION AND NATURALIZATION SERVICE OF THE DUTY TO ASCERTAIN WHETHER GOOD CAUSE EXISTS FOR DENATURALIZATION PROCEEDINGS

In support of their argument for a restrictive interpretation of the broad language Congress added when it adopted Section 235 (a), petitioners suggest (Pet. Br. 2–3, 25, 35) that the use of subpoenas for investigative purposes usurps a judicial function by implementing an inquiry

which, if it discloses adverse evidence, may result in a future denaturalization proceeding. They argue in essence that since they procured their certificates of naturalization by judicial decree, and since Section 340 (a) of the Act prescribes a judicial proceeding for cancellation, no administrative investigation is warranted. All inquiry going to the issue of legality of naturalization, they contend, should be deferred until after a suit is filed when (Pet. Br. 35) "a pretrial examination in such suit can accomplish the very purpose [the Service] now seeks to accomplish."

This argument misconceives the relationship between administrative investigation and judicial proceedings, both generally and within the specific context of the Immigration and Nationality Act. There is no inconsistency between the power of a government agency to investigate possible violations of law committed to it for administration, and the power in the prosecuting arm of government to bring formal proceedings in court when the decision has been made that a violation probably exists. Cf. *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–643; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 201; *Penfield Co. of Cal.* v. *S. E. C.*, 143 F. 2d 746, 751 (C. A. 9), certiorari denied, 323 U. S. 768; *Consolidated Mines* v. *S. E. C.*, 97 F. 2d 704, 707 (C. A. 9). An administrative agency in its sphere of responsibility and competence has a preliminary investigative function very much

like that of a grand jury in the field of general criminal law. Petitioners in fact apparently concede this point (Pet. Br. 38).[7] And as we develop in our brief in *Minker* (pp. 21–28), such a relationship has long existed between investigative functions of the Immigration Service and the litigating function of the United States Attorney's office.

Thus, there is no inconsistency between the administrative investigation to determine whether grounds might exist requiring institution of a cancellation proceeding and the provision in Section 340 (a) for the bringing of suit by the United States Attorney after investigation reveals such grounds. Obviously, a proceeding under Section 340 (a) does not emerge spontaneously, without full administrative investigation to sustain the high degree of proof necessary in such cases. It is usually the Service which executes a "good cause" affidavit as the final product of exhaustive investigative procedures. At least since the promulgation of the first statutory denaturalization provision in 1906, the Service has conducted the investigation now formalized by regulation (8 C. F. R. 340.11). Responsive to the continued and increasing concern of Congress

[7] They state (Pet. Br. 38):

> We do not doubt the undoubted power of the Congress to grant power to its officials to make preliminary investigations prior to the commencement of actions in Court. We do doubt Congress granted such power by the provision in question here.

with improperly obtained certificates of naturalization, investigative subpoenas under Section 235 (a) appropriately implement this familiar function.

Only a persistent misconception of the nature of administrative investigation can explain petitioners' statement that naturalization certificates "should not be annulled by administrative action where a judicial proceeding is set up to accomplish such purpose" (Pet. Br. 35). The short answer is that investigation by the Service "is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so". *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 201. There is no suggestion that the investigation can serve the purpose of or replace the judicial revocation proceeding under Section 340 (a)—except only to the extent that investigation frequently establishes the lack of ground for any such proceeding. See the Government's Brief in *Minker* (pp. 33–34).[8]

Similarly without foundation is petitioners' broad contention that enforcement of the subpoenas in this case would violate their right of

[8] A similar misconception underlies the argument of respondent in *United States* v. *Minker*, No. 35 (Brief for Respondent, pp. 17 *et seq.*) urging that the use of administrative subpoenas for investigative purposes offends against the constitutional separation of powers.

privacy (Pet. Br. 32–35). There can be no doubt as to the authority of Congress to empower the federal courts to summon persons before them for the purpose of an equity suit challenging the validity of certificates of naturalization. Cf. *Bindczyck* v. *Finucane*, 342 U. S. 76, 81–82; *Baumgartner* v. *United States*, 322 U. S. 665; *Mackenzie* v. *Hare*, 239 U. S. 299, 311–312; *Johannessen* v. *United States*, 225 U. S. 227. And petitioners concede (Pet. Br. 35) the propriety of pretrial examinations for purposes of such proceedings. Cf. *United States* v. *Costello*, 222 F. 2d 656 (C. A. 2), pending on petition for certiorari, No. 155, this Term. This plainly justified concession reveals the unsubstantiality of their argument. The only means available for compelling obedience to subpoenas under Section 235 (a) is a judicial order. There is no constitutional difference, and petitioners suggest none, between a judicial order for pretrial examination and a judicial order enforcing an administrative subpoena.

This simple conclusion entails no disregard of the fact, stressed by petitioners (Pet. Br. 33–34), that the individual's right of privacy enjoys protections unavailable to corporations. The dispositive point remains that petitioners have no blanket freedom from legitimate government inquiry—whether it concerns possible violations of the revenue laws (cf. *United States* v. *Murdock*, 284 U. S. 141), possible frauds on the nationality

laws, or any of the other subjects of potential civil or criminal action covered by the extensive powers of administrative subpoena discussed in our *Minker* brief (pp. 35–37, 40–43).

We do not, of course, imply that petitioners would be deprived of opportunity to make any valid claim of constitutional right or special privilege as to questions they may be asked on inquiry. No claim of Fifth Amendment privilege has been raised as yet and therefore no such issue is now before the Court. *United States* v. *Murdock*, 284 U. S. 141, 148; *Brown* v. *United States*, 276 U. S. 134, 144; *United States ex rel. Vajtauer* v. *Comm'r of Immigration*, 273 U. S. 103, 113; *Carroll* v. *Savoretti*, 220 F. 2d 900 (C. A. 5); *Schoeps* v. *Carmichael*, 177 F. 2d 391, 398–399 (C. A. 9), certiorari denied, 339 U. S. 914. Other questions of constitutional right which might be presented during inquiry are more properly deferred until the necessity for their decision arises. *United States* v. *Petrillo*, 332 U. S. 1, 5. What is decisive for present purposes is that the Service had both legislative and constitutional authority to issue the subpoenas now under attack.

Similar considerations dispose of the remaining suggestion (Pet. Br. 39) that the construction given Section 235 (a) by the court below would allow indiscriminate questioning and harassment of naturalized citizens by the Service and should for this reason be rejected. These generalized forebodings have no foundation in fact.

The type of investigation involved in the instant case is, as we have indicated, confined in its scope to the precise issues outlined by regulation. A district director must be satisfied, furthermore, that there is a prima facie showing that grounds for revocation exist before such investigation may even be undertaken. 8 C. F. R. 340.11.[9] Any witness subpoenaed under Section 235 (a) must be informed of the subject matter of the investigation in a far more precise manner than in many other kinds of administrative inquiries. In addition, he is afforded full opportunity, as the procedures in this case attest, to obtain judicial review of the jurisdiction of the Service to conduct its inquiry.

The fact that the Service officers might transgress their power or fail to accord witnesses procedural due process in a particular case is therefore no more cogent an argument for refusing to enforce Section 235 (a) than it would be for refusal to enforce any other subpoena provision. The federal courts are given enforcement authority and can meet such contentions on a case-by-case basis. The critical problem in this case is not the remedy for some possible future abuse, but the basic power to obtain information. The only issue here is whether the Service may issue subpoenas in the course of an investigation to

[9] Other regulations providing for investigations under the Act define the jurisdictional limits of inquiry with similar precision and specificity. *E. g.*, 8 C. F. R. 242.11 and 287.2.

determine whether good cause exists for instituting proceedings for cancellation of a certificate of naturalization. We submit that such authority is given by the statutory grant of power to subpoena for investigation of matters relevant to the enforcement of the Act and the administration of the Service.

CONCLUSION

It is respectfully submitted that the judgments of the Court of Appeals should be affirmed.

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